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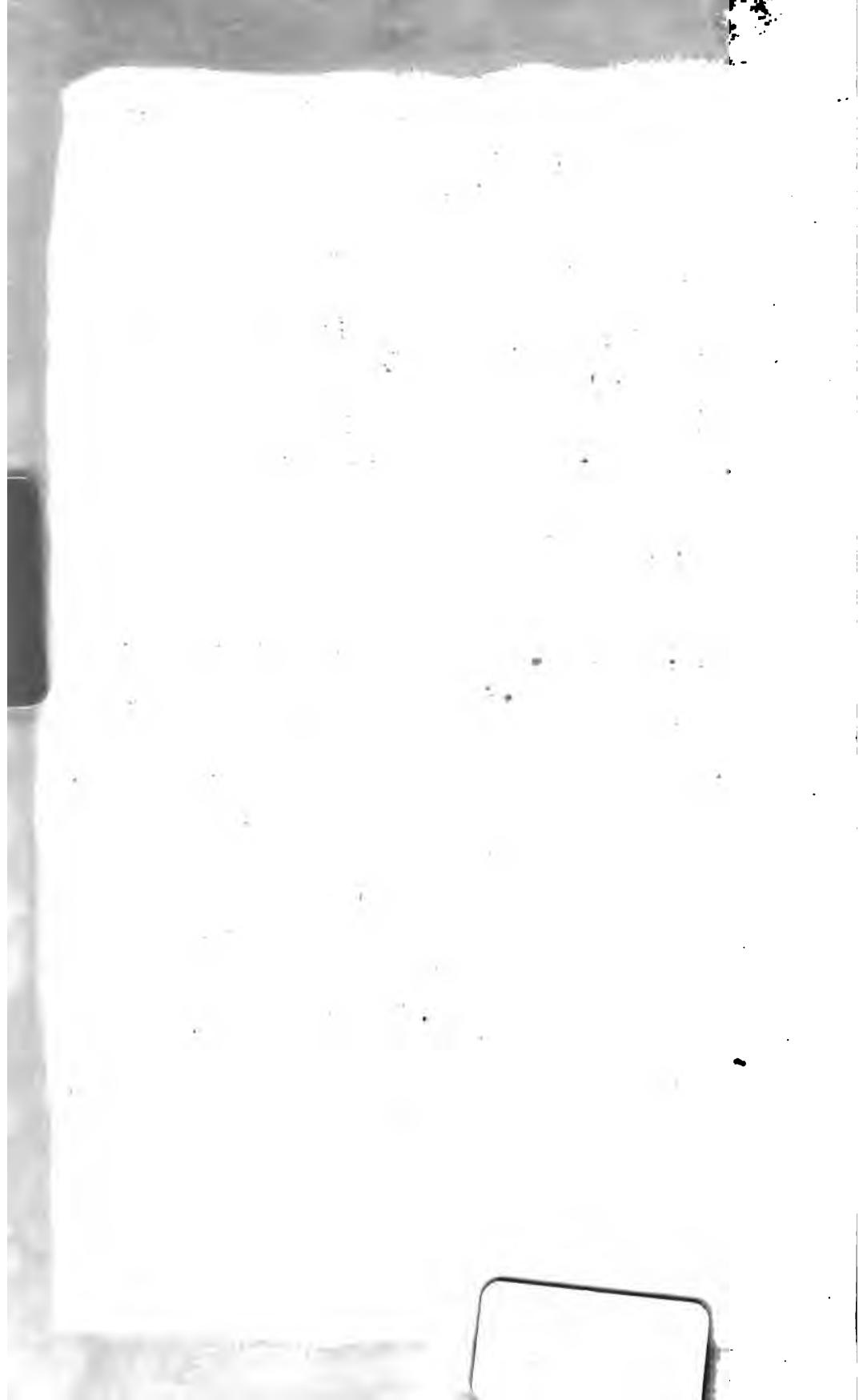
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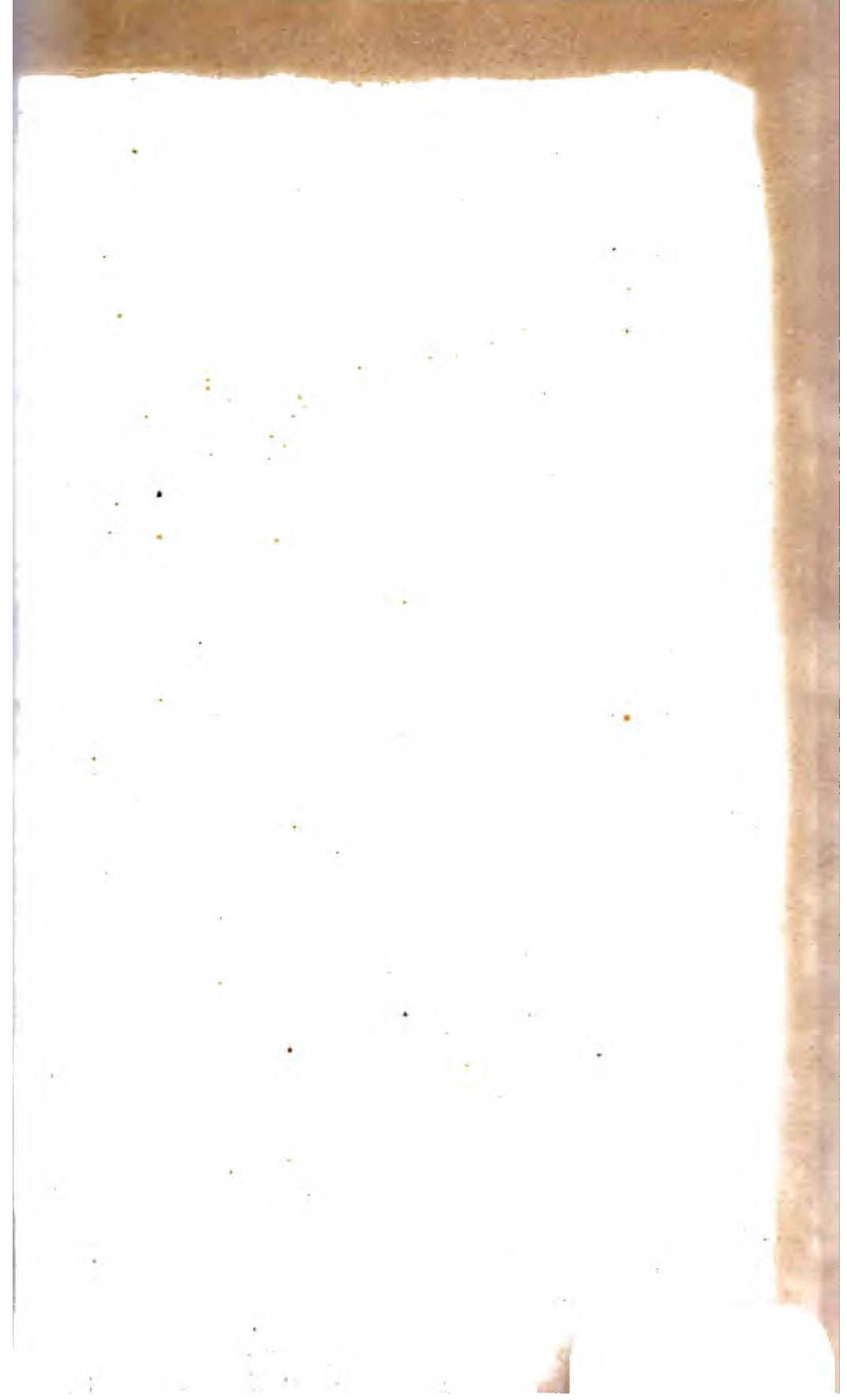
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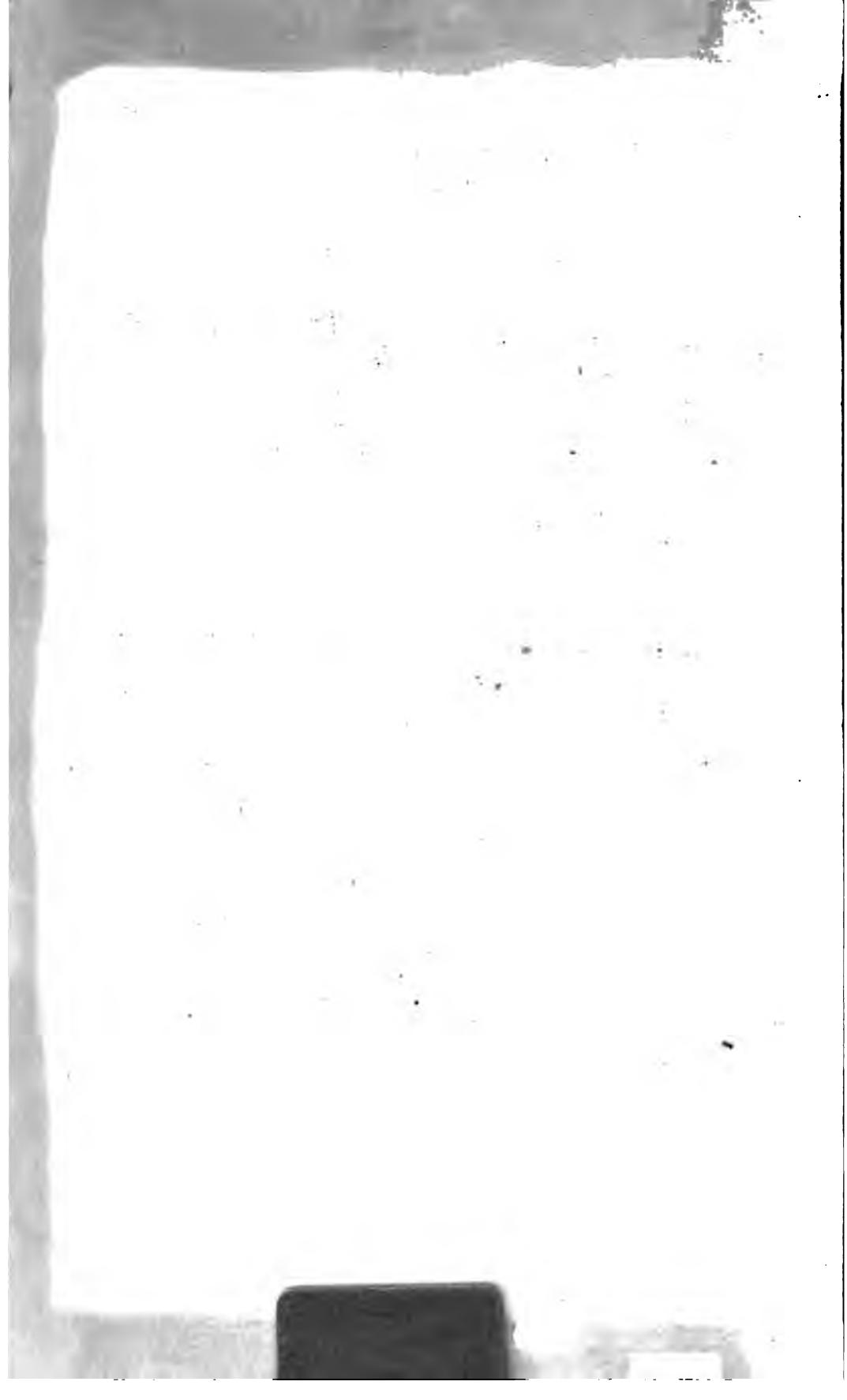
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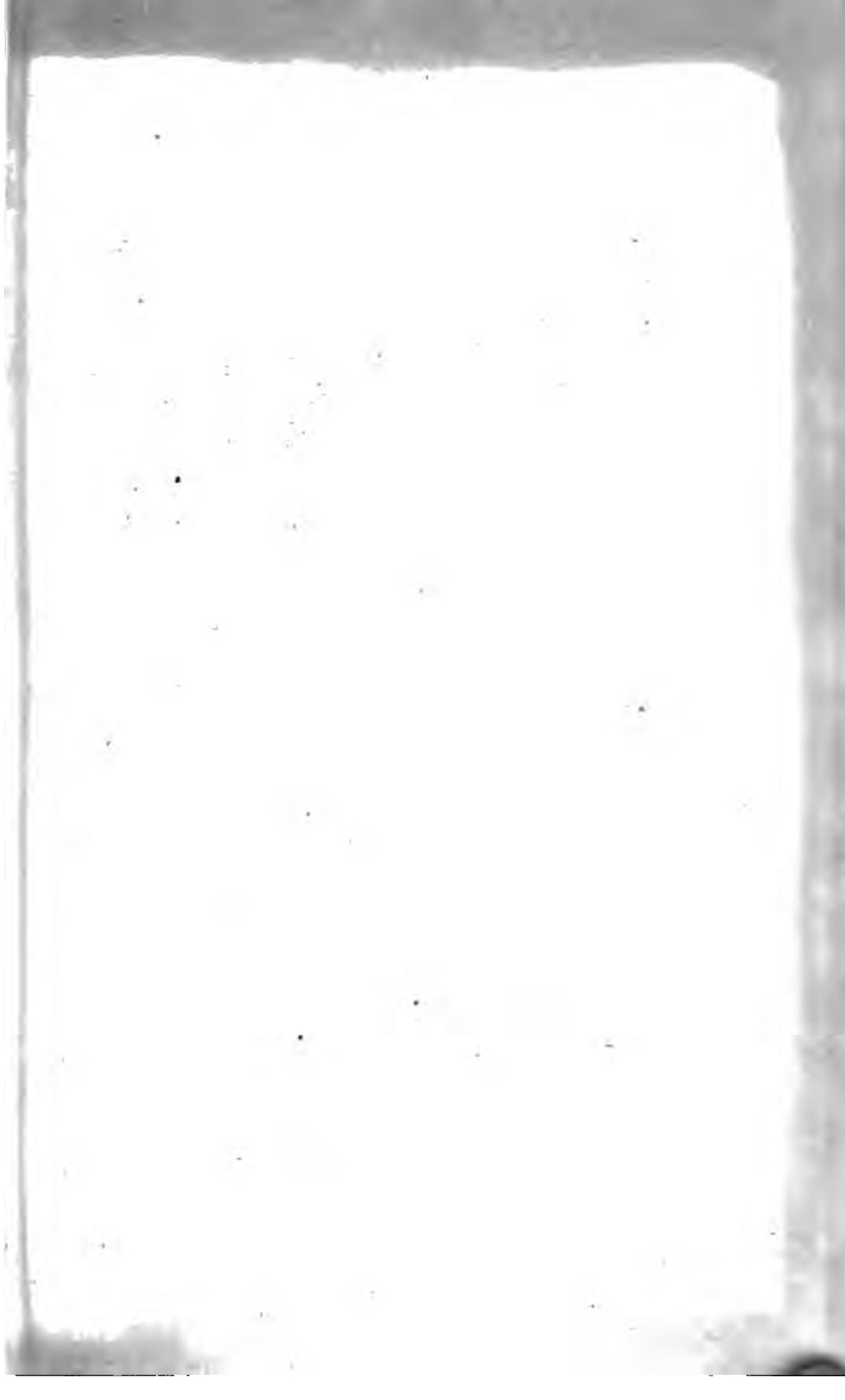
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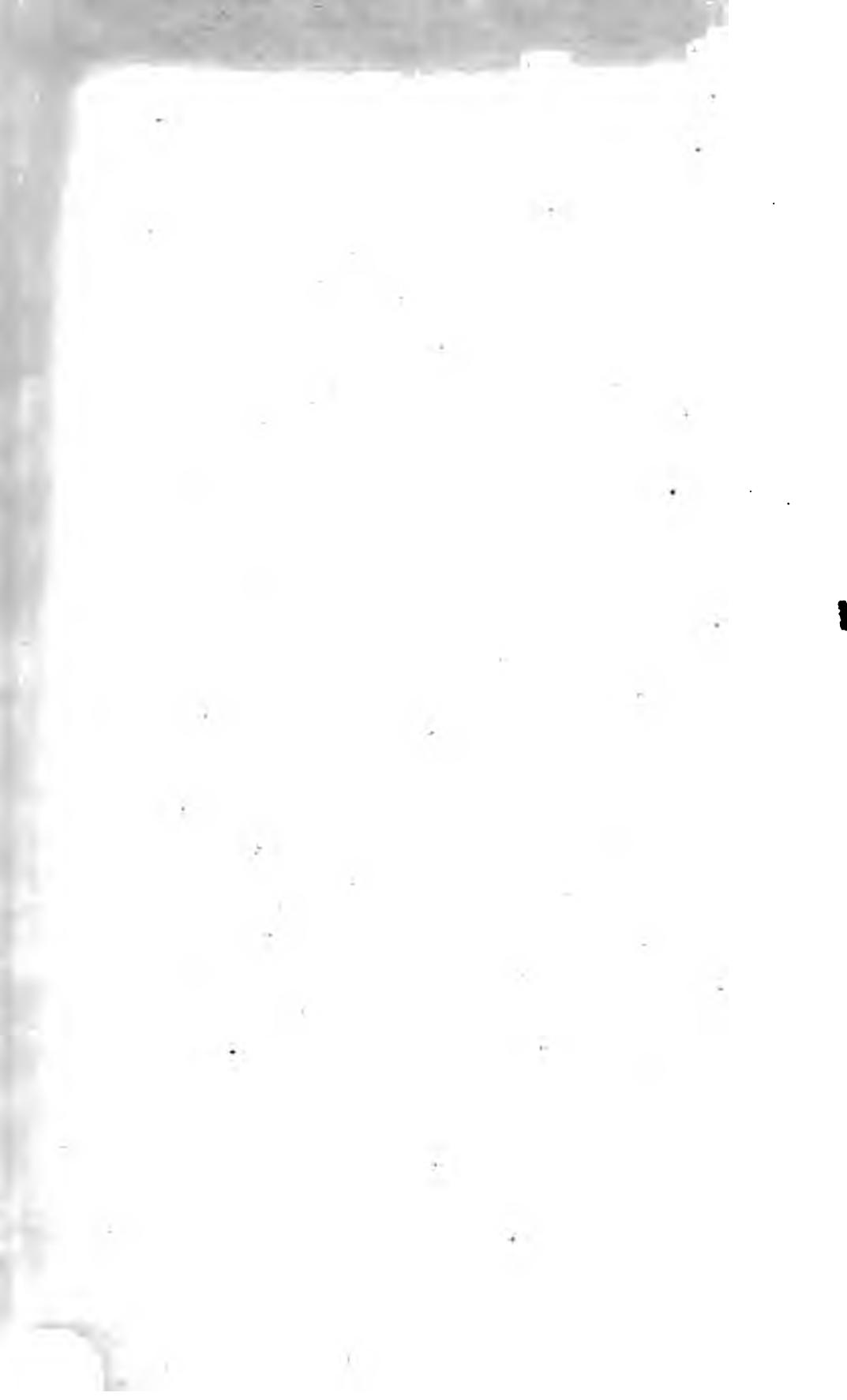




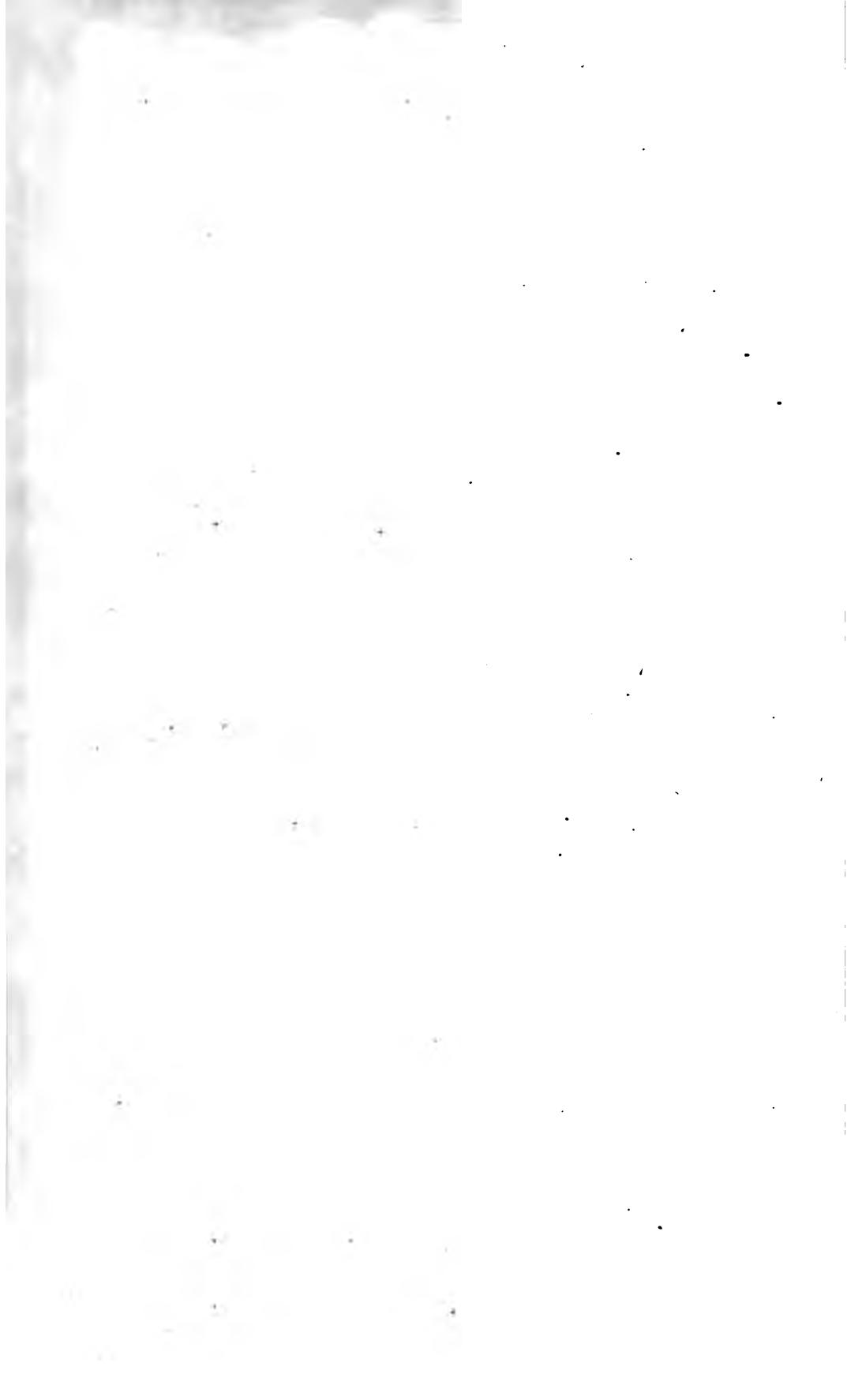












REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN THE  
High Court of Chancery,

FROM THE YEAR M DCC LXXXIX TO M DCCC XVII.

WITH A DIGESTED INDEX.

BY FRANCIS VESEY, JUN. ESQ.  
OF LINCOLN'S INN, BARRISTER AT LAW.

In Twenty Volumes.

VOL. XVII.

M DCCC X. . . . M DCCC XI. L AND LI GEO. III.

FROM THE LAST LONDON EDITION, WITH THE NOTES OF FRANCIS VESEY, JUN. ESQ.  
AND THE EXTENSIVE ANNOTATIONS OF JOHN E. HOVENDEN, ESQ.  
OF GRAY'S INN, BARRISTER AT LAW.

THE WHOLE EDITED,  
WITH NOTES AND REFERENCES TO AMERICAN LAW,  
AND SUBSEQUENT ENGLISH DECISIONS,  
BY  
CHARLES SUMNER, ESQ.

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**LORD ELDON, Lord Chancellor.**

**SIR WILLIAM GRANT, Master of the Rolls.**

**SIR VICARY GIBBS, Attorney General.**

**SIR THOMAS PLUMER, Solicitor General.**

## CASES IN CHANCERY, ETC.

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50 GEORGE III. 1810-11.

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### PEARCE *v.* PIPER.

[ROLLS.—1808, DEC. 19. UPON APPEAL. 1809, JULY 19, 20, 22, 31.]

SOCIETY for raising an Annuity Fund for the members: the rate of subscription being too low, though the subsisting fund was equal to the Annuities then payable, and no adequate remedy by the Articles, inquiries were directed; 1st, to ascertain the state of the Society, the defect of the plan, &c.; 2dly, to provide a remedy: namely, by additional subscription, adequate to the object, by paying the arrears, and providing for the present and future annuities (a).

THE Bill stated articles of agreement, dated the 25th of June, 1798, for the establishment of a Society under the title “The Amicable Society of Master Bakers” for raising an annuity fund: containing provisions for payment of the annual subscriptions, &c.; that a member, who continued a year in arrear, should forfeit the money paid; lose all claim on the fund; and cease to be a member of the Society; that no member should become entitled to any efficient benefit from the Society, until he had been a member seven years; had completed his seven years’ subscription; and had attained the age of sixty years. The articles farther provided for the appointment of a board of directors; with power to call extraordinary general meetings, as they \*should see occasion; providing farther, that any twelve or more members should have power to convene an extraordinary general meeting, in the manner particularly specified. [\*\_2]

The articles then, pointing out the mode, in which the fund, arising from the subscriptions and fines, should accumulate during seven years, directed, that at the end of seven years the clear capital should be valued and ascertained; and the subsequent subscription and annual produce thereof should be applied in discharge of the current

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(a) 1 Madd. Ch. Pr. 93; 2 ib. 180.

expenses and annuities, due or to become due ; and that every subscriber, who should have been a member seven years, and should then have attained the age of sixty years, should be entitled to a clear annuity of 60*l.*, for life ; and the widow of every such annuitant to an annuity of 30*l.*, or in certain cases 60*l.*, for her life, if she continued a widow ; and reciting, that as by reason of any heavy demands upon the annual produce of the capital fund, occasioned by several annuities becoming due at or near the same time, or otherwise, the same might be inadequate to the immediate discharge thereof, it was declared, that in every such case it should be lawful for the Society at a general meeting to postpone the payment of such annuities for any time, not exceeding three calendar months : such annuity, or any part thereof, being nevertheless considered as vested interests from the time or times of the same becoming due by the articles.

After various provisions for management it was farther declared, that any twenty or more members, present at any general meeting, should have full power to consider, treat of, and determine upon, all matters and things, relating to the said Society, or the support, preservation, and good order, thereof ; and to alter and amend the said articles ; or to make any additional rules or articles for the [\* 3] \* better, more orderly, successful, or satisfactory, management of the affairs of the Society ; so as no alteration, &c. should be made without the concurrence of three fourths of the members, assembled at such general meeting upon special notice ; nor unless confirmed by the like majority at some other general meeting to be held, as therein directed.

It was farther declared, that if at the expiration of seven years, or at any subsequent period, it should appear to a general meeting or board of directors, that the subscription and other moneys of the said Society, and the rents and annual produce of the funds and trust estates thereof, thereby charged with and liable to the payment of the aforesaid annuities and the other outgoings, were unequal to the payment thereof respectively, then and in such case such additional subscription should be paid by every member, as well annuitants as others, except only in the case of blindness, as aforesaid, and in such manner, as should be determined, by the members assembled at a general meeting to be convened for that special purpose : it being the true intent and meaning of the parties to the said articles, that no part of the capital or principal fund and estate of said Society, so to be valued and ascertained as aforesaid, but the subscription and other moneys, the rents, issues, profits, dividends, and annual or other produce thereof only, as before directed, should after the expiration of such seven years be applicable to the payment of any of the aforesaid annuities or other outgoings.

The Plaintiffs stated their rights as annuitants under the articles ; and a resolution of the board of directors on the 31st of July, 1806 ; that having taken into consideration the report of the committee, appointed to consider, what annuity the present state of the [\* 4] subscription \* would pay each member, and considering the

table annexed, the board were of opinion, that the Society could no longer exist; therefore considered it right to recommend, that it should be forthwith dissolved; and that every member should be repaid his principal and interest. The Plaintiffs, insisting against the legality of this resolution, prayed an account against the trustees of the funds of the Society, and of what was due to the Plaintiffs for arrears of their annuities; that the amount of the annual produce of the funds might be applied, as far as it would extend, in payment of what should be due to the Plaintiffs; an account of all sums in the hands of the cashier for subscriptions; and that out of that fund the Plaintiffs may be paid so much as the annual produce should not be sufficient to pay; and, if the said subscriptions and other moneys and the rents and annual produce of the funds, should not be sufficient, that the trustees or directors should cause such additional subscriptions to be paid as would be fully adequate to the due payment of the Plaintiff's annuities; and that they may be paid accordingly; &c.

The answers stated the resolution of the board of directors, that the present table of subscriptions was founded in error, and could not support the promised annuities; that at a special general meeting, held in consequence of that resolution, it was resolved, that the Society should be dissolved: only twenty members out of one hundred and twenty-two, who were present, voting against the dissolution; that the resolution of the board of directors was upon the opinion of Mr. Morgan and Mr. Fairman; that, though the income might for some time be sufficient to pay the annuitants by the original articles, the Defendants believe, that ultimately, when they become numerous, and within the period of the lives of many of the present members, it will by the inadequacy \* of the present table of subscriptions, and the erroneous calculations, on which it is founded, be sufficient to answer a very small part; that in consequence of such defect, and the impossibility of removing it, and of paying the annuities, the Society cannot in justice to all its members any longer exist; and that there are no clauses in the articles, providing for any deficiency, arising from erroneous calculations.

This cause having been argued at the Rolls by Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Wingfield*, for the Plaintiffs, and by Mr. *Richards*, Mr. *Fonblanque* and Mr. *Johnson*, for the Defendants, stood for judgment.

1808. Dec. 19th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—I feel great reluctance in deciding this case on account of the consequences of the decision either way. On the one side it is very hard to deny any relief to the annuitants: who have earned it by payment of their subscriptions: on the other, it is sufficiently established, that this Society will not have the means of continuing to pay their annuities, at least without a much higher rate of subscription. It is to be regretted, that the persons, entrusted with the direc-

tion, did not sooner think of taking the advice, to which they ultimately resorted : but for a number of years they permit the members to proceed in paying their subscriptions ; and take the chance of the death under sixty of members of the aged class ; until they found the number of survivors greater than they expected ; when they began to consider the circumstances, in which they were involved : by the effect of the erroneous principle, upon which their calculations had proceeded : the annuity being much too high : or the subscription much too low. That seems to me to be no \* answer to those, who by the existing regulations have become entitled to their annuities. It was probably conceived, that the proposed rate of subscription would be sufficient: but can I hold that to be a condition, upon which the right to the annuity is to depend ? Such a condition is not expressed : nor can it be implied. This was not an unforeseen case. They had in contemplation the circumstance, that the subscriptions might not be sufficient to raise the annuities, proposed to be given ; and the provision they make for that case is, not that the annuity shall not be payable, or even that the amount shall be diminished, in such an event: but that the deficiency shall be made up by an additional subscription of all the members, the annuitants and the others, in such mode as shall be agreed on. The only limitation of the right of the annuitants is, that in case from several annuities becoming due at the same time the fund should not be sufficient to answer them, payment shall be postponed for three months ; but even then the annuity was to vest from the time, when the party attained the age of sixty. According to the articles there is no doubt upon the right.

It is then said, that it is difficult to give an effectual remedy. It may be so : but that is no reason for refusing relief altogether. It is very advisable, that this Society should come to some arrangement for the future : but in the mean time I do not see, how I can withhold from these Plaintiffs the relief, to which the articles entitle them : and I think, the prayer of the Bill points out the correct relief.

A Decree was pronounced ; declaring the Plaintiffs respectively entitled to be paid their annuities ; and directing an account \* according to the prayer of the Bill. From that

[\* 7] Decree the Defendants presented a Petition of Appeal ; insisting, that the Bill should be dismissed ; that the resolution to dissolve the Society was proper ; and that a Court of Equity ought not to lend its aid, and give effect and duration to an undertaking, founded in mistake ; and the consequences of which must inevitably involve in ruin many of the parties.

Sir *Samuel Romilly*, Mr. *Leach* and Mr. *Wingfield*, for the Plaintiffs.—It is obvious, that the difficulty, which occurred in this Association, might have been met by making a call under the general power for that purpose. The course, that was taken, is the result of a scheme, formed by the younger members, far the more numerous class, upon the expiration of the seven years ; when the funds of the

Society first became liable to the charges, imposed by the deed. The general meeting had no authority to dissolve the Society. The resolution to dissolve it cannot be represented as an act for "the support, preservation, and good order, thereof :" the objects to which their general powers are limited : but they have the special power of forming new rates of subscription ; if the established rules appeared to be insufficient. The notion of a right to dissolve, inherent in such a Society, is absurd. It can be only by contract. The ground of opposition to this agreement is, that it is against conscience ; as being founded in mistake. This cannot be represented as a bubble : the funds being sufficient for payment of these annuities at present ; the right to which has attached in those members, who have paid their subscription seven years, and attained the age of sixty : the two contingencies expressed in the deed.

\* Mr. Richards, Mr. Fonblanque, and Mr. Johnson, for [ \* 8 ] the Defendants.—These Plaintiffs cannot be entitled to the exclusive benefit of the fund against those, who have, since their right accrued, and those, who may hereafter become equally entitled to annuities. One objection is, that this is a mere bubble : a scheme, founded in error. It is evident, that these tables and rates of subscription cannot provide a fund for the annuities, that will become due ; and these Plaintiffs are not entitled to any more benefit than the other parties, engaged in the same adventure, so founded in error. All these persons having embarked in the same speculation, interested in the same proportion, and under the same title, can one class derive the whole advantage to the exclusion of the rest ; and upon what principle can a Court of Equity interfere for such a purpose ? That is the proposition maintained by this Bill : but there is no instance of aid afforded in equity to a scheme, founded in complete error, and pregnant with mischief to the great majority of those concerned : nor any ground upon which relief can be obtained. As to the objection, that they had no right to dissolve the Society, if a meeting was called, it was entirely in their discretion to do, as they thought fit, as to other subscriptions. How can this decree be executed ? By the terms of the contract the annuities must arise from the annual produce ; and can in no case be drawn from the capital.

Sir Samuel Romilly, in reply.—Societies of this nature are much favored ; and are considered as peculiarly under the protection of the Legislature and the Courts of Justice. These persons are partners, voluntarily contracting upon mutual covenants : it is only in a Court of Equity, that justice can be done between them :

\* and they are entitled to it under the general prayer ; if [ \* 9 ] they cannot have the specific relief. The Defendants have determined to put an end immediately to the Society ; and to distribute the fund among the members in proportion to the original subscription ; not taking notice of any person, not then a member. If the specific relief prayed is not to be obtained, some arrangement ought to be made for dissolving the Society ; for ascertaining, what

is the annuity, that ought to have been purchased by such a subscription, and for securing that annuity to the Plaintiffs: but there is no justice in refusing to these persons, who if they had died under the age of sixty, would have lost the whole amount of their subscription, the object of their contract, when the event has proved in their favor. If the Bill should be dismissed, they will be left without any means of redress. Notwithstanding their anxiety to guard against breaking in upon the capital, the Court will now, rather than put an end to the Society, apply the capital, as a fund, by which the general object of the Association may be carried into effect, and secured. It does not depend upon the pleasure of the members, convened in a general meeting, whether there shall, or shall not, be any farther subscription. It is imperative upon the directors to order a farther subscription in the case specified: the amount of that subscription being left for regulation in a general meeting. The utmost loss to the Defendants is the forfeiture of a small subscription: a very inconsiderable disadvantage. There is no hardship in enforcing the agreement among all these persons. It is only from their great number that they are not exposed to actions of covenant; against which there could be no relief.

The Lord CHANCELLOR [ELDON].—It is true, the Legislature has manifested great anxiety for these Societies, particularly [\* 10] in making effectual \*instruments of this nature; but Courts of Justice cannot so deal with them; if the object fails by mistake, or the imperfection of the instrument. There is no difficulty upon this as a hard bargain. I do not see that. The difficulty is this; that this relief, in order to do justice to these individuals, perpetuates injustice in its very principle. First, I doubt, whether any action could possibly have been maintained. It must have been an action of covenant; founded upon a breach of something, covenanted to be done, within, not only the meaning, but the letter, of this instrument. Suppose at the expiration of seven years the funds had not proved sufficient to pay the annuity, to commence at that time: the person entitled had every individual member of this Society a covenantor with him: but he must, bringing an action against any individual, have proceeded to show, that what is required by the 17th Article had been specifically done; and, not only the subscription, but the manner of it, being determined upon, that the Defendant refused to pay. In moral justice you must look beyond the demand of that individual. The foundation of this Decree is, that an additional capital must be collected; and if the produce will pay the Plaintiffs, that is all, that is required: but, if another person should become entitled to an annuity the next day, unless another Decree should be made for him, he would suffer the same injustice. The principle of this Decree therefore requires an accumulated capital from time to time. It was put with force, that there is a capital, which ought to be applied to the purchase of annuities for the Plaintiffs: but the same difficulty would still occur; as by that application it must become daily more insufficient

for the payment of future annuities ; and the result would be, not that a future subscription would be avoided, but that the fund admitted by the principle of this Decree to be already insufficient, must become more inadequate to such future annuities as might become \* charges upon it ; and it must be recollect- [<sup>\* 11]</sup> ed, that other persons are by subscriptions already paid for one or more years, in progress to the same situation, in which they will have the same rights, vested in them, as these persons have already acquired.

The question upon the whole is, whether there is not in the original contract a fundamental error, imposing the necessity of administering from day to day the funds of this Society ; and in that view it appears extremely difficult to support the Decree. This is a case foreseen by the articles ; the framer of which appears to have been much perplexed, when forming the last item ; supposing, that at the expiration of seven years there may be a defective fund ; and proposing to make a fund, that will be sufficient without breaking in upon the capital. The means provided for meeting that deficiency which was foreseen, is, not a direction, that the trustees shall cause a new subscription to be made, but a general meeting, to determine upon that measure ; and to prescribe the form and mode of the subscription, by which that deficiency should be made good. It is very difficult to say, how the trustees could execute the direction to cause such a subscription to be made.

The case of *Buckley v. Carter* (1), before Lord Thurlow, was afterwards mentioned ; as having a strong resemblance to this ; and the cause stood over, in order that the Register's Book might be examined.

1809, July 22. \* The Lord CHANCELLOR [ELDON].—The [<sup>\* 12]</sup> first object of consideration in this case is, whether the principle of this Institution is such, with reference to all the covenants, if a specific execution of them is to be given, that a Court of Equity would interfere to enforce it. The parties, who formed this Society, proposed to establish certainly a very useful institution ; to the success of which, every one must wish fairly to contribute ; and regret the failure, if there is in the original constitution some error, fatal to its existence : arising from the desire of different individuals to have towards the close of life that degree of ease and comfort, which a proper application of the fruit of the labor of their more early years might produce. The plan devised for executing that object, was a contribution for seven years, varying in amount, according to the different ages of the subscribers ; increasing, in proportion to the advanced period of life : that contribution forming a capital, calculated to produce an income, sufficient to pay certain annuities to individuals, members, attaining the age of sixty, and to their

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(1) In Chancery, 7th April, 1785; 16th March, 1787; Reg. Book, 1784, A. fol. 425; 1786, A. fol. 486.

widows in given cases. Making no observation at present upon the last clause of this deed, which, it was conceived, might effectually provide for an event, that was not thought probable, it seems to have been supposed, that there would necessarily be contributors enough to produce a fund, that would insure by an application of the income the regular payment of the annuities. I cannot ascertain, whether the rates of subscription were adequate to secure all the advantages, intended by the professed objects of the Institution: but obviously it was impossible to secure those objects, unless the contributions were of an amount, that would at the end of seven years form a capital, sufficient to answer the future annuities out of the income. It is farther obvious, that this scheme took the chance of that entirely; upon the presumption, that the number [\* 13] of \*contributors would be sufficient: the last clause perhaps regarding the event, that farther calls might be required, as, though possible, not probable; not pointing out the mode of making them; which certainly was not to be according to the prayer of this Bill.

Overlooking that circumstance, that this plan might not invite a sufficient number of contributors to pay all the annuities at the end of seven years, they proceed to execute this deed; which is an instance, in addition to many others, of individuals, conceiving themselves at liberty to act, as if they were a corporation; not having that character; and placing themselves under difficulties, sooner or later, from which it is almost impossible to relieve them. One obvious difficulty is, upon the prayer of the Bill, which is adopted by the Decree, that the trustees or directors shall cause additional subscriptions to be paid. The trustees may call: but will the subscribers come upon that call? There are only two ways of enforcing it: either by suit; or by forfeiture of the former subscription. To which they would choose to be exposed I cannot determine; and, unless they know more than I do of the nature of this plan, the number of subscribers, and the probability of future calls, it is impossible to say, what would be the effect of any suit for farther subscriptions.

There are various clauses, as to the powers of general meetings, and the management of the funds: one directing, that at the end of seven years the capital shall be valued; and the subsequent subscription, and the annual produce thereof, shall be applied in discharge of the current expenses, and the annuities, due, or to become due: so that the income, to be applied, is, not only the produce of the capital within the seven years, but of the subsequent [\* 14] \*subscription also. It is obvious however, that, if the capital at the end of seven years was not sufficient to produce the annuities, that circumstance might considerably affect the amount of future subscriptions by the alarm it would excite in those, who were, and proposed to become, members; and would consequently affect the accumulated fund, which was to produce the annuities. Another clause, which seems to contemplate, that, not per-

manent, but temporary difficulties might arise in paying the annuities, occasioned by several of them becoming due nearly at the same time, provides, that in such case payment shall be postponed for three months, a very short time for relieving them from such difficulties.

The only other clause, relating to this question, is the last; also providing for the case of a deficiency of the annual income to answer the annuities; not however simply, as the former clause, deferring the payment for three months; but, taking it to be clear, that such a remedy would not supply the deficiency; and providing other means; which the Court must either act upon, as it finds them; or provide means according to the general rules of Law and Equity. The specific means, here provided, are, not an authority to the trustees, according to the prayer of this Bill, to call for an additional subscription: but that measure is left to the discretion of a general meeting; and, if that meeting should refuse to make a call, the question would then arise, whether upon general principles of Equity, founded in contract, that refusal would be considered so unwarrantable, that this Court would direct an additional subscription in some other mode; and in that view of the case there are great difficulties, as to parties, and other circumstances. This brings it to the point, which originally startled me; and still presents a very considerable difficulty: whether we \*are to [\* 15] consider the means of carrying on this Institution; and not what may be an equitable distribution of the fund, if it is not to be carried on; with regard to which, though I do not know, what they meant as to the terms of dissolution, the Court would not find it difficult to do justice to those, who, having subscribed, had not become annuitants; and those, who had died. In the other view of the case the question will be, whether there is not latent in this plan something tending to its own destruction; if the fund, not being sufficient to supply the annuities, is to be from time to time aided by farther subscriptions. Lord Thurlow's Decree is a direct authority for making that inquiry in the first instance. I shall by looking into that Decree enable myself to state more decisively, than I can at present, the principle, that ought to govern the Court: but I shall be infinitely more satisfied, if these parties, feeling, that justice and prudence require them to set this right, will do all, that they covenanted to do with regard to each other; or, if they cannot do all, as much as they can.

*July 31st, 1809. The Lord CHANCELLOR [ELDON].—The case before Lord Thurlow is a very important precedent. The Bill was filed by some widows, on behalf of themselves and all others, who should come in and contribute to the expense of the suit; claiming under a settlement, dated the 19th March, 1761, and enrolled in Chancery; stating the origin of the association, the fact of payment of the subscription; that the Plaintiffs had thereby become entitled to, and enjoyed, their annuities down to the year 1781; when the*

directors declared their opinion, that the funds were not sufficient out of their annual produce to provide for the annuities. By the articles, as in this case, the capital was not to be touched. The di-  
[\* 16] \* rectors did not exert the right they had to call for an in-creased subscription : but the course they took was to re-duce the annuities. Lord Thurlow held, that they had no right to do that : also, that, if the Court could find the means of enforcing the execution of such articles, considering the number of parties, nec-es-sary to a suit, the directors ought to have kept up such a fund as would be sufficient to answer the proper amount of the annuities ac-cording to the original contract : but farther ; and I think he was right ; that, if the scheme was founded upon miscalculation, the So-ciety could never be kept right by any specific performance. The first consideration therefore was, whether the scheme by miscalcula-tion as to the subscription, or otherwise, had not a tendency to de-feat its object : then, whether any alteration of the terms or calcula-tion could so correct the plan as to secure the object.

The Defendants were, not the trustees, but the directors ; and the prayer of the bill was, that they might be decreed to fulfil the orig-i-nal contract. Lord Thurlow, as appears by the Register's Book, and I perfectly recollect the decision, made this Decree, on the 7th of April, 1785 ; directing a reference, not to the Master, but to a par-ticular individual : to inquire, whether upon a specific performance of all the covenants and clauses of the deed the plan of the institu-tion was adequate to answer all the objects of that deed, abstracted from any particular circumstances ; and if it should appear inade-quate, to state the amount of the deficiency ; and the means where-by those objects might have been sufficiently provided for without any reduction : an account of the expenses, and of the annuities, which would have been payable at Lady-Day, 1781 : to take into consideration the present state of the Society : to state the defects of the plan, and such means as will provide an effectual

[\* 17] \* remedy. On the 27th of May, the minutes were on my motion varied by inserting a direction to pay the arrears and growing payments of the annuities, as they stood reduced by consent, without prejudice.

Mr. Brand, the person to whom the reference was directed, by his report stated particularly various provisions of the deed ; which gave powers as large as those, given by the instrument, now under con-sideration : among them a power, much resembling that in this deed, to make calls *toties quoties* ; provided, that no call should exceed one year's annual subscription ; and he certified, that such sums of money as might arise from the payments, to be made under the sixth and thirteenth clauses, some forfeitures specified, the annual in-terest of the capital stock, and the powers of the directors to make calls, formed the whole of the provision, intended for the annuities, and the expense of management ; which appeared to be all the ob-jects of the Institution ; that those provisions were insufficient to answer all the purposes of the Institution ; the provisions, originally

made, were inadequate ; and had a tendency to destroy the object ; that the provisions of 1781 were also inadequate, though the annuities had been reduced ; and the time must continue to approach, when the application of these provisions will destroy the plan. The report then states, what would supply the deficiency ; and that, unless those calls were unnecessary, the plan must be founded in error ; and have a tendency to destroy the objects and the Society itself.

The result of the representation made by this Report, is, that, if the agreement had been specifically performed, the plan of the Institution was defective in the circumstance, that the subscription was originally too low ; and, as to the calls to be made, the opinion both of Mr. Brand and Lord Thurlow was, that, if the defect of \* the original subscription went to the original plan, the [\* 18] item as to the calls was also a defect in such an Institution.

On the 16th of March, 1787, the cause came on for farther directions. Lord Thurlow would not permit the fund to be touched ; but brought it into Court ; as has been properly done in this instance ; as attention must be given to the just claims of all parties ; those, who have not yet become entitled to annuities, and the deceased, as well as those, who are living ; and have become entitled. When the cause came on again, Mr. Brand having stated what in his opinion would be a just and equitable arrangement by an increased subscription, it was agreed, that each member should pay a guinea ; which produced a fund, sufficient to pay the arrears of the annuities, which had been reduced in 1781. Then, taking into consideration the plan, which Mr. Brand said would give existence and life to the original object, a new deed was executed upon that reformed plan ; by that arrangement securing to all the members the benefits of the Institution, as far as could be ; and the Bill was dismissed without costs.

This is an authority, directly applicable to the case, now before me. If I could ascertain, that there never would be another annuitant entitled, the relief prayed is right ; but, supposing it given, and a new subscription called for ; the funds might be sufficient to pay the annuities for this year : but, if any of the members, alarmed at the additional calls, should under the apprehension of farther subscriptions quit the Society, the first individual, who became entitled, would disturb the arrangement, made by this Decree ; which provides only for the annuities, subsisting at present ; if more annuities should become payable, the fund could not be sufficient : there must either be a new Decree ; or the Society must act, as \* if there was ; providing a fund for every increase of annuities. The consequence is necessary ; that the annuities are not purchased upon the original terms ; and, as the terms rise by the failure of the annual subscription, the necessity of farther calls increases ; and the result may be, that the annuitants are to pay each other. That is the vice at the bottom of the thing.

This Society will be sensible, that it is much more easy for them,

than for the Court, to arrange this. If they cannot agree on some plan, I must refer it to the Master to make similar inquiries to those, directed by Lord Thurlow; taking the assistance of a calculator: and to inform me, if this Society cannot longer exist, what will be an equitable distribution of the fund subscribed (1): but that course is not to be taken, unless the Court shall be unable to do more justice by securing to those, who have, and may, become entitled to annuities, the enjoyment of them. The nature of the inquiry will be, first, whether the plan, upon which this Society has been regulated, is adequate to its purposes; and, if not, what additional subscription will be sufficient to discharge the arrears now subsisting; and to pay the present and future annuities; without having recourse to that last clause; which would destroy the object of the Society (2).

In *Beaumont v. Meredith*, 3 Ves. & Beat. 181, it was held, that a society for the mutual benefit of the members in sickness or old age, by means of a fund raised by subscription amongst themselves (such association not coming within the scope of the acts for encouragement of friendly societies), could only be considered as a partnership, having no corporate character; and that, to such a suit, the whole of the members must be parties, all of them having equal rights, or being subject to equal liabilities. In the case cited, Lord Eldon observed, he remembered only two suits of this sort coming to a hearing (adverting to the principal case, and that of *Buckley v. Cater*, stated therein). In one of these cases, his lordship added, it was discovered by Lord Thurlow, and in the other by himself, that the society in question existed upon principles which made the whole a bubble; and the only relief, therefore, which could be administered, was by dissolving the society, and giving to each member a proportion of the sums subscribed for purposes which could not be answered, and which no court of justice could execute. In the later case of *Ellison v. Bignold*, 2 Jac. & Walk. 511, the same doctrine was recognized; and in *Reeve v. Parkins*, 2 Jac. & Walk. 390, an injunction was granted to restrain payments by a friendly society, founded on erroneous principles tending to exhaust its funds.

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(1) *Reeve v. Parkins*, 2 Jac. & Walk. 390.

(2) See the note, *ante*, vol. iv. 628.

## GOWLAND v. DE FARIA.

[ROLLS.—1810, FEB. 21.]

THE sale of a reversionary interest, in this Court considered as the case of an expectant heir, forms an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside (*a*).

During the continuance of the same situation, acquiescence has no effect; and the value is to be estimated at the time of the transaction, not according to the event.

Interest at 5 per cent. upon the money advanced: compound Interest refused.

THE Bill stated, that the Plaintiff in the year 1783 was in great distress and difficulties; and inexperienced in legal affairs: and, being entitled to the reversion of a considerable estate in fee-simple after the death of his mother, then aged fifty-seven, proposed to raise money by way of annuity; and was introduced to the Defendant, De Faria; who, being aware of the Plaintiff's difficulties and inexperience, took advantage thereof; and for the inadequate consideration of 1500*l.* induced and persuaded the Plaintiff to grant him an annuity of 200*l.* for the term of nine hundred and ninety-nine years from the decease of the Plaintiff's mother; which sum was paid to the Plaintiff; who executed a bond and warrant of attorney to confess judgment, dated the 24th of September 1783, in the penal sum of 3000*l.*; with condition for payment of the annuity; and by indentures of the same date the reversion was demised for two thousand years to a trustee for securing the annuity; with a covenant by the Plaintiff to deliver up the title-deeds upon the death of his mother. In the next year the Plaintiff granted to the Defendant another annuity of 50*l.* in consideration of 375*l.*, with similar securities. The Plaintiff's mother died in February 1808; and the Bill was filed in May following; charging, that the Defendant took advantage of the Plaintiff's distress and inexperience, to compel him to give unreasonable and excessive securities; praying that the securities may be delivered up, to be cancelled; and offering to repay the money advanced with interest.

The Defendant by his answer representing, that the Plaintiff voluntarily, and without solicitation by the \* Defendant, offered to sell the annuities, proposing to bind himself personally, stated the Defendant's belief that every thing was read over to the Plaintiff; that the covenants for delivery of the title-deeds were introduced with his privity; and submitted, that the Plaintiff received a full and adequate consideration, his mother be-

(*a*) The relief is granted upon the general ground of mischief to the public, without requiring any particular evidence of imposition, unless the contract is shown to be above all exception. 1 Story, Eq. Jur. § 336. See *ante*, note (*c*) *Coles v. Trecothick*, 9 V. 234; note (*a*) *Croue v. Ballard*, 1 V. 215.

As to the effect of mere inadequacy of consideration in common cases, see *ante*, note (*a*) *Moth v. Atwood*, 5 V. 845.

ing then in a good state of health, likely to live long; and having lived many years.

Mr. Morgan, of the Equitable Assurance Office, by his depositions stated, that the value in 1783 of a well-secured rent-charge or annuity of 200*l.* granted for nine hundred and ninety-nine years certain, to commence on the death of a widow lady, then in a good state of health, aged fifty-seven, according to the then price of 3 per cent. Bank Annuities, from 59 to 64*l.*, was 2308*l.*; and that the value of the other annuity in 1784 was 523*l.* The Plaintiff went into no other evidence.

Sir *Samuel Romilly* and Mr. *Wakefield*, for the Plaintiff.—Upon this Bill, to set aside the grant of annuity, and have the securities delivered up, the relief is plain, after the late cases, *Peacock v. Evans* (1), and *Evans v. Griffith*, before the Lord Chancellor; both cases of the mere sale of reversionary interests for an inadequate consideration, without fraud, set aside. This Bill seeks relief against the grant, in consideration of 1500*l.*, of an annuity of 200*l.*, from the death of the Plaintiff's mother, aged fifty-seven, for the term of nine hundred and ninety-nine years, secured by bond and judgment, and a term of two thousand years; in effect a perpetual rent-charge; with a covenant to deliver up all the title-deeds; [\* 22]. but no covenant \* on the other side to produce them for the Plaintiff's protection; an undervalue proved of more than one third; and the Plaintiff not appearing to have had any legal advice: the Defendant's Solicitor only being present at the execution. His age is not material: *Twisleton v. Griffith* (2). The grounds of relief appear upon the instruments; though the allegations of the Bill are not supported by evidence.

Mr. *Hart* and Mr. *Girdlestone*, for the Defendant.—This Bill was filed in the year 1808, to set aside the purchase of an annuity in 1783; without any evidence of distress, or advantage taken; and a most respectable Solicitor acting for the Defendant. Unless every person, seised of a reversion, is considered as an expectant heir, and therefore incapable of dealing with his reversion, no case can be more destitute of all ground for relief. The knowledge of the Plaintiff's distress is denied by the Answer; which farther proves, that the offer came from the Plaintiff; and is not contradicted by evidence. The transaction therefore appears to be no more than a mere purchase upon the application of the vendor, in 1783; and a Bill filed, when the life dropped, in 1808. Mr. Morgan's valuation is 2308*l.*: but the event has ascertained the value of the consideration of 1500*l.*; which at compound interest would have been doubled in fourteen years. The Court will not determine upon these speculative calculations, when the event has ascertained the value. Under such circumstances, after a lapse of twenty-five years no principle of public policy can require the transaction to be res-

(1) *Ante*, vol. xvi. 512; see the note, 518.

(2) 1 P. Will. 310.

cinded. In *Peacock v. Evans*, it was held, that the Court acts cautiously, with a view of doing justice to the party, whose contract is set aside; where there is no fraud or improper conduct.

*Evans* \* was in the most complete sense an expectant heir; [\* 23] with no income, except an allowance from his father, and under a habit of intoxication; selling the reversion of a freehold estate under a settlement.

The consequence of setting aside this purchase will be an enormous advantage to the vendor and loss to the purchaser, upon the mere allegation, that the former was dealing for a reversion: without fraud, or any particular distress. An expectant heir must look in that character to the person, from whom he is to derive the estate: but the Plaintiff's father was dead; and the possession was only withheld during the life of his mother under the limitation to her for life. The protection, that Courts of Equity have given to that peculiar character, cannot arise out of the mere relation of mother and son. In all the cases of contract set aside the purchaser by permitting it to stand would have had a great advantage. The Bill rests merely upon the point of inadequacy; which is no more than a strong symptom of fraud; and the event has proved, that the calculations, from which that conclusion has been collected, have no foundation.

Sir *Samuel Romilly*, in reply.—The question of value does not depend upon the event; but relates to the time, when the purchase was made. The Plaintiff's mother might have died immediately: but no relief could have been given upon that ground; according to *Mortimer v. Capper* (1) and many other cases. Any person, having a reversionary interest to dispose of, is in this Court an expectant heir: whether that interest is derived from a father or any other person. The application for relief has never been considered too late, if \* made as soon as conveniently can be, after [\* 24] the circumstances, which give the right to it, ceased: during the prevalence of which the same state of necessity is supposed to continue; and acquiescence has not the effect of confirmation. In the case of *Evans v. Griffith*, upon a loan to the Plaintiff, who was to repay four times the amount, if he survived his father, who died in a few months, I used without success the arguments, that are now pressed; urging the injustice of taking the chance of advantage, and complaining only upon the event turning the other way; but the answer of the Lord Chancellor was, that the same argument might have been used in every case, where re-payment was to depend on surviving the father: yet, as the son was not in a situation to apply for relief, until the event had happened, the relief was always given. Whatever disadvantage there is results from the established law of the country. The Plaintiff can only show by the transaction itself, that he is an expectant heir, evidence, that he has no other means of subsistence: and the ground of relief has always been, that he was dealing for a reversionary interest. In *Farmer v. Wardell*, a Motion

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(1) 1 Bro. C. C. 156; *Jackson v. Lever*, 3 Bro. C. C. 605.

for an Injunction on the purchase of a reversionary interest, the proof was imposed upon the purchaser.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—In considering the case of *Evans v. Peacock* I found the doctrine of the Court perfectly established, that it is incumbent upon those, who have dealt with an expectant heir relative to his reversionary interest, to make good the bargain : that is, to be able to show, that a full and adequate consideration was paid. That is undoubtedly a heavy burden imposed upon a purchaser : but in that particular case the burden is imposed upon him ; and that case is an exception [\* 25] to the general rule, that for \* mere inadequacy of value a contract is not to be set aside. In all these cases the issue is upon the adequacy of the price. This is the case of a person, who in this Court is considered as an expectant heir. He has charged his reversionary interest ; and the question is, whether he has received an adequate consideration. Upon that question the evidence is all one way. In many of these cases very opposite opinions are given by calculators : but here Mr. Morgan's opinion is not contradicted. I must therefore take the value to be inadequate ; and then I do not see, how I can avoid setting aside the contract ; unless the Defendant can prevail upon one of the other two grounds, that have been taken : first, that after such a length of acquiescence the Plaintiff ought not to be permitted to set aside the contract : secondly, that the value is to be calculated upon the result, and not as it might have been estimated at the moment of the transaction. As to the first, there is I believe no case, in which during the continuance of the same situation, in which the party entered into the contract, acquiescence has ever gone for any thing (1) : it has always been presumed, that the same distress which pressed him to enter into the contract, prevented him from coming to set it aside ; that it is only when he is relieved from that distress that he can be expected to resist the performance of the contract. As to the other ground, that in the event, which has happened, a very large price has been paid by the Defendant, I apprehend, I cannot take that into consideration. In the case of *Evans v. Peacock* I am pretty certain, that I did not lay the least stress upon the circumstance, that the death of Evans, the father, happened in a very short period after the purchase ; nor allow it to weigh against Peacock, as in any degree affecting the validity of the bargain. If the contract had been fair at the moment, when it took place, the accident of its becoming more advantageous by [\* 26] the death of one of the parties would \* not according to my opinion have varied the character of the original transaction.

Upon these grounds I think this case not to be distinguished from *Evans v. Peacock* ; and the result must be the same.

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(1) Nor even confirmation : *Crope v. Ballard*, 3 Bro. C. C. 117; 2 Cox, 253; *ante*, vol. i. 215.

Interest upon the money advanced was directed at 5 per cent.; but compound interest was refused (1).

An application was made for the Defendant's costs; as in *Evans v. Peacock* the Defendant's costs were given; though the contract was set aside: the Defendant being considered as a mortgagee for the money advanced.

Sir *Samuel Romilly*, for the Plaintiff, relied on the late case of *Innes v. Jackson* (2); where, the equity of redemption of the wife's estate being reserved to the husband, the Lord Chancellor decided, that it was to be considered as reserved by mistake; and that the heir of the wife was entitled; and refused the costs of the Defendant Dr. Jackson farther than he was actually a mortgagee.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—In *Evans v. Peacock*, though the contract was set aside, as it was not upon the ground of fraud, I gave the costs; considering the Defendant as a mortgagee, upon the authority of a case (3) before Lord Cowper: a strong \*case certainly, as it contained some [\*27] circumstances of fraud. If however it has been recently settled, that a Defendant under these circumstances is not to be considered as to all intents a mortgagee, I should abide by that decision.

The MASTER OF THE ROLLS afterwards said, he did not think the case before the Lord Chancellor was directly in point to this: and seemed disposed to make the same Decree as in *Evans v. Peacock*: but it was compromised.

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SEE the references given, *ante*, in the notes to *Peacock v. Evans*, 16 V. 512; and note 3 to *Coles v. Trecothick*, 9 V. 234.

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(1) See the note, *ante*, vol. i. 99.

(2) *Ante*, vol. xvi. 356. The Lord Chancellor's Decree was, with his Lordship's concurrence, reversed by the House of Lords.

(3) *Twisleton v. Griffith*, 1 P. Will. 310, before Lord Cowper. See also *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Gould v. Oakden*, 4 Bro. P. C. 560, was also referred to as to Costs.

## LOWNDES v. COLLENS.

[ROLLS.—1810, FEB. 14.]

UNDER a written contract for a sum of money, payable on demand, or a day certain, interest is in Equity, as at Law, payable from the time of demand made, or from the fixed period of payment (*a*).  
Interest at 5 per cent. under a contract to give promissory notes.

IN November 1802 an agreement took place between William Strother and James Tompsett Collens for dissolving their partnership; and that Collens should take the partnership stock, and pay the debts; and by a memorandum of agreement, dated the 16th of December, 1802, it was agreed, that in consideration, that the creditors, present at a meeting, held that day, consented to accept fifteen shillings in the pound upon the account of their several debts, John Collens, the father of James Tompsett Collens, engaged and agreed to pay to all and every the creditors the sum of fifteen shillings in the pound upon the amount of their several debts in manner following: viz. ten shillings in the pound within six weeks; and the remaining five shillings within three months from this day; and he agreed to secure the same by his promissory notes of hand, to be given to each [<sup>\* 28]</sup> of the said \* creditors within one week; and the said creditors agreed to accept the said notes in full satisfaction of all demands whatever upon the said Messrs. Strother and Collens, or upon the said John Collens, and to execute a general release upon payment of the said notes.

The Bill, filed by creditors claiming under this agreement, and praying particularly, that John Collens may be decreed to give his promissory notes according to it, was upon his death revived against his executors; and, an account of what was due under the agreement having been directed, an Exception was taken to the Master's Report for not calculating interest upon the several sums, reported to be due.

Sir *Samuel Romilly* and Mr. *Leach*, in support of the Exception said, the rule must now be considered as settled, that a note, payable on demand, or at a day certain, bears interest from the time of the demand, or the fixed time of payment; according to *Upton v. Lord Ferrers* (1).

Mr. *Hart*, Mr. *Cooke*, and Mr. *William Agar*, for the Defendants, contended, that in Equity interest can be given only upon the ground of contract; referring to *Tew v. Lord Winterton* (2), and *Creuze v. Hunter* (3).

(*a*) For the authorities and rules which govern in matters of interest, see, *ante*, note (*a*) *Tait v. Northwick*, 4 V. 816; note (*a*) *Craven v. Tickell*, 1 V. 60; *Newman v. Douglas*, 7 Har. & J. 417; Chitty, Contr. 642–648.

As to debts upon simple contract, and other debts which do not carry interest upon the face of them, Equity, in giving interest, follows the law. See 1 Barbour, Ch. Pr. 515.

(1) *Ante*, vol. v. 801.

(2) *Ante*, vol. i. 452.

(3) *Ante*, vol. ii. 157; 4 Bro. C. C. 157, 316.

The **MASTER OF THE ROLLS** [Sir WILLIAM GRANT].—I had always taken it to be clear, that, wherever there is a written contract for a sum of money, payable upon demand, or upon a day certain, interest is payable from \* the time of the demand [\* 29] made, or, from the fixed period of payment; and there is no difference, whether that contract is contained in a promissory note, or any other instrument. It would be very inconvenient, that a different rule should prevail at Law and in Equity with regard to that question. It came often before Lord Alvanley; who had occasion to consider it much in many other cases besides *Upton v. Lord Ferrers* (1); particularly in *Parker v. Hutchinson* (2); where he states the practice at law, as to notes payable at a day certain, or a written undertaking, to give interest (3). The interest there given was however only 4*l.* per cent.

Sir *Samuel Romilly* suggested, that the Court would act upon the agreement, as if the promissory notes had been given; upon which the Master of the Rolls said, he thought the interest must be the same as a promissory note would have borne.

See the note to *Parker v. Hutchinson*, 3 V. 133, with the farther references there given.

### NASH v. SMITH.

[ROLLS.—1810, MARCH 15.]

**RESULTING** trust for the heir; the only express devise being to convey to the devisor's son from and after his age of thirty; which he did not attain; and no devise by implication from a declaration, that he shall have no power over the estate until his age of thirty.

JOSEPH NASH gave, devised, and bequeathed, unto his executors and trustees all his manors, messuages, lands, tenements, real and personal estate whatsoever, \*with the exception [\* 30] of some trifling articles, afterwards particularly disposed of; to hold to them, their heirs, executors, &c. according to the nature of the said estates, upon the several trusts, and subject to the several powers, &c. after-mentioned: that is to say, on trust thereout to pay his debts, an annuity of 20*l.* to his wife in satisfaction of dower: to each of his daughters 100*l.*, with interest, and to his two grandsons 10*l.* a-piece.

(1) *Ante*, vol. v. 801.

(2) *Ante*, vol. iii. 133. See also i. 63, *Craven v. Tickell*, and the note.

(3) *Ex parte Koch*, 1 Ves. & Bea. 342; 1 Rose, 317. *Ex parte Williams*, 1 Rose, 399; *Ex parte Greenway*, Buck, 412; *Burgess's Case*, 2 J. B. Moore, 745, as to the distinction in Bankruptcy; which is done away by the Statute 6 Geo. IV. c. 16, s. 57, 132.

The testator then authorised and empowered his trustees to sell or mortgage all or any part of his said real or personal estate for the purposes of his Will ; or to let the real estate ; not exceeding twenty-one years ; to fell timber, as they shall think fit ; and after payment of his debts, legacies, and other charges, declared his will, that the residue of the money to arise by sale of any part of his real estate and other his personal property, in case his trustees shall think fit, shall be invested in the public funds or other security, in trust to pay and apply the interest, dividends, and produce, thereof, as the same shall arise, to and for the only use and benefit of his son Thomas Nash, until he shall attain his age of thirty years ; and in case of his decease, before he attains that age, then in trust for such child or children of his (the testator's) said son as shall happen to survive, in such shares and proportions as he shall by Will appoint, and in default thereof to such child or children, if more than one, share and share alike ; or in case of no child or children to such person or persons as shall be the legal representative or representatives of his (the testator's) said son ; " and from and after my son shall attain his age of thirty years I hereby direct my executors and trustees to convey transfer and assign all such part or parts of my real and personal estates or trust moneys not applicable to or for other the purposes of this my Will to my said son Thomas Nash, \* his heirs executors administrators and assigns, according to the nature of the said estates for his and their own use : it being my intention that my son shall have no power over any part of my real or personal estate except as aforesaid until he shall attain the age of thirty years : nevertheless it is not my desire, that my real estate should be sold unless my executors and trustees shall deem it expedient."

The testator died on the 6th of October, 1803. The trustees sold part of the real estate ; and in December 1807 demised the lands, remaining unsold, to Thomas Nash, for the term of twelve years. He died in January 1808 under the age of thirty and without issue ; having by his Will, dated the 2d of September, 1807, devised and bequeathed all his real and personal estate whatsoever and wheresoever, whether in possession, reversion, or expectancy, either under the Will of his father or otherwise, to his wife, her heirs, executors, &c. ; who filed the Bill ; stating, that she had contracted to sell the real estate, remaining unsold under the Will of Joseph Nash, to the Defendant Thomas Brand ; and praying, that her right may be established ; that the Defendant Brand may be decreed specifically to perform the contract ; and that all proper parties may be decreed to join in the conveyance to him.

The Defendants, the sisters and co-heiresses at law of Thomas Nash, by their Answer insisted, that they were entitled in the event, that happened, the death of Thomas Nash under the age of thirty and without issue.

Sir *Samuel Romilly* and Mr. *Wingfield*, for the Plaintiff, contended, that in the event, there was no disposition of the real estate remaining unsold.

Mr. *Richards* and Mr. *Hall*, for the Defendants.—Upon the true construction of this Will the real estate passed under this devise to these Defendants, the co-heiresses at law. There is no doubt, that a devise may be made to the person, who shall be the heir at law; whose title under such devise, as *persona designata*, would be established; and upon the whole of this Will, particularly the clause, declaring the testator's intention, that his son shall have no power over any part of his estate, until he shall attain the age of thirty, this is a devise of that sort; and the heir at law is the legal representative, pointed out by the testator in the event. In the execution of this executory trust the intention, which is sufficiently declared, to prevent a resulting trust for the heir, must have effect; and has prevailed in much weaker cases. With what object could this testator, treating the whole of his property as the subject of his Will, make no disposition of the rents of his real estate, until his son should attain the age of thirty? The clause, that he shall have no power over the estate before that age, is merely directory, not restrictive and exclusive.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—I may perhaps conjecture, that the intention of this testator is very insufficiently expressed: but I do not know, that I am at liberty to fill up the blank, which he has left. I am desired to introduce into this Will a disposition of the real estate in the event of the death of his son under the age of thirty; which the testator has wholly omitted. There is no disposition of the real estate in that event: but it is said, that by analogy to the disposition of the personal estate I am to infer, that the testator intended to give his land in the very same manner as his money. See, how that stands. Creating a general trust of his real and personal estate for the payment of \* his debts and legacies, he does not leave it arbitrarily to [ \* 33] the trustees to convey, or keep, it at their discretion, but gives them a power to sell or mortgage, only if it shall be necessary for the purposes of his Will. He directs, that the residue of the money to arise by sale of any part of his real estate and his personal property, after payment of his debts, legacies and other charges, shall be invested in the funds, or other security. Then what he proceeds to dispose of is that mixed fund of personal property and the produce of real estate, directed to be sold. He contemplates the case of his son's not arriving at the age of thirty; and in that case gives to his child or children, subject to his appointment; or, in case of no child, to the representatives of his son. So far there is a complete disposition of this part of his property in the event of his son's death under the age of thirty. He then proceeds to the case of his son's attaining that age; and in that event directs, all the real and personal estate and the produce of the real estate sold, not applicable to the other purposes of his Will, to be conveyed and assigned to his son, his heirs and executors, according to the nature of the said estates: but that is the first disposition of the real estate. There is nothing before concerning it. It is too much to say, I am

to introduce the real estate in that clause, in which he has professed to dispose only of the produce of the part of the real estate, which it was necessary to sell, and of the personal estate.

When I say, nothing is mentioned before as to the real estate, I mean as to the beneficial interest in it. The consequence is, that the trust of the real estate resulted in the mean time to his son. He never attained the age of thirty : consequently he never took the real estate under the Will ; as to the declaration, that he should have no power over any part of the real or personal estate, [\* 34] \* except as aforesaid, until he arrived at that age, that will not of itself amount to a disposition of the real estate ; though it affords some argument, that the testator conceived he had put the real, as well as the personal, estate in his son's power ; as otherwise it was unnecessary to make such declaration ; but that appears to me insufficient to authorize the Court to say, that there is in this Will an actual disposition of the real estate in the event of his son's death under the age of thirty. The consequence is, that the son took it as heir ; and therefore it goes to his devisee.

A SUMMARY of the leading rules to be observed in the construction of testamentary instruments, is collected, *ante*, in note 4 to *Blake v. Bunbury*, 1 V. 194 ; see, also, the notes to *Stanley v. Stanley*, 16 V. 491. As to the cases in which a resulting trust arises in favor of a testator's heir at law, see notes 2, 3, to *Kidney v. Coussmaker*, 1 V. 436 ; and note 1 to *Halliday v. Hudson*, 3 V. 210.

### BENYON v. BENYON.

[ROLLS.—1810, FEB. 16, 19 ; APRIL 3.]

LEGACIES to the same persons by distinct instruments accumulative : subject to be repelled by internal evidence ; as where the same sum is given for the same cause : whether by the mere equality of amount, *Quere* (a). Revocation of an annuity, and substitution of another, notwithstanding a misdescription : no other annuity or instrument appearing.

UNDER a Decree, directing an inquiry, what was due to the Plaintiffs and the other legatees of the testator Edward Henry Benyon in respect of the legacies, given by his Will and testamentary papers, the Master's Report stated the following instruments.

Edward Henry Benyon by his Will, dated the 16th of October, 1800, in case he should die unmarried, gave and bequeathed among other things to his mother Mrs. Hannah Benyon the sum of 500*l.* : to his eldest brother, the Defendant, Richard Benyon, the sum of 200*l.*, and to his wife Mrs. Elizabeth Benyon the sum of 50*l.* for a ring : to his (the testator's) sister Hannah Elizabeth Benyon the sum of 1000*l.* : to his sister Emma Benyon the sum of 1000*l.* : and to his

(a) The object of the Court will be to ascertain the intention of the testator See, *ante*, note (a) *Moggridge v. Thackwell*, 1 V. 464.

sister Frances Benyon the sum of 1000*l.* : to his brother Charles Benyon, Esq. the sum of 200*l.* : to his sister Lady Middleton the sum of 100*l.* : and to his sister Charlotte Berens the sum of 100*l.* ; and to her husband Joseph Berens the sum of [\* 35] \* 100*l.* as an acknowledgment for his trouble as one of his executors ; and as to his servant John Adam Elmer if living with him at his decease the sum of 20*l.* : directing, that all the aforesaid legacies and also his just debts and funeral expenses should be paid as soon as conveniently might be after his decease.

By the first codicil to his Will, or the testamentary paper, dated the 31st of December, 1802, the testator among other things charged his brother the Defendant Richard Benyon, after having paid all his funeral expenses and just debts, to pay unto Miss Dorothea Elizabeth Hanske of Weimar in Saxony the sum of 150*l.* sterling *per annum*, as long as she should remain single, and only the sum of 75*l.* sterling *per annum* should she marry. He also left unto Miss Dorothea Elizabeth Hanske the sum of 100*l.* sterling as a legacy which should be paid to her immediately after his decease : the aforesaid sums to be paid to her free from all deductions. He also left unto his son the Plaintiff Edward Richard Benyon, born at Bellevue on the 21st of November, 1802, the sum of 4000*l.* to be paid unto him when he should attain the age of twenty-one years: the said sum to be put out at interest immediately after the testator's decease ; the sum of 100*l.* sterling *per annum* to be paid unto his mother Miss Dorothea Elizabeth Hanske for his maintenance, until he came of age ; and the remainder of the interest to accumulate, and to be paid unto him with the capital on his coming of age : should the testator's brother Richard Benyon not find the aforesaid sum of 100*l.* sterling *per annum* sufficient for his maintenance, he was to be at liberty to allow him as much of the remainder of the interest as he should think proper. In case that Miss Dorothea Elizabeth Hanske should marry he directed, that the aforesaid sum of 100*l.* sterling *per annum* for the maintenance of his son should be no [\* longer paid unto her but unto his brother Richard ; whom [\* 36] he charged with the care of his son Edward Richard and his godson ; and trusted, that he would not refuse that last request from a brother.

The testator also left unto his said son Edward Richard his gold watch, chain and seals, that was given to him by his brother Richard Benyon, Esq. In case that Miss Dorothea Elizabeth Hanske should be with child at his decease, he left unto the offspring of that birth, let it be male or female, the sum of 1000*l.* sterling ; which sum should be paid unto him, her or them, on their attaining the age of twenty-one : the interest of the said sum to be paid unto Miss Dorothea Elizabeth Hanske for his, her, or their maintenance. In case the aforesaid Miss Dorothea Elizabeth Hanske married, he declared, that the sum of 75*l.* sterling *per annum*, which she would lose by that act, should fall to the child or children, born after his decease ; and at her death the remainder of her annuity should be paid unto

them; which would make out the aforesaid annuity of 150*l.* He also left as a legacy to his mother the sum of 50*l.*, and to his sisters unmarried 100*l.* each, and to the married ones 50*l.*: likewise to his brother Charles Benyon the sum of 100*l.*: also unto Joseph Berens, jun. Esq. for his trouble of acting as one of the executors 100*l.* The remainder of his fortune he left to his brother Benyon, Esq., to be laid out in land as mentioned by his last Will.

By another codicil, dated the 22d of December, 1804, the testator, reciting, that in his codicil he devised an annuity of 175*l.* to Mrs. Elizabeth Hanske (stated in the Report to be the same person as Dorothea Elizabeth Hanske), for her and his son's use, over which she was to have full power, thereby revoked the said part [<sup>\* 37]</sup> of his codicil; and substituted that his said codicil \* to bequeath the annual sum of 75*l.* for her own use during her life free of all deductions. He also bequeathed the sum of 4000*l.* sterling to his son Edward Richard Benyon to be disposed of by his brother Richard Benyon, Esq. and Joseph Berens, whom he had nominated his trustees, for his use, until he attained the age of twenty-one.

The Master stated his opinion, that the legacies, given by the first codicil, to those persons, to whom legacies were given by the Will, were additional legacies; and with respect to the legacy of 4000*l.* by the said two codicils or testamentary papers given to the Plaintiff conceived, that the latter was a substitution for the legacy or bequest of a like sum of 4000*l.* given by the paper of the 31st of December, 1802, and not a double legacy: and consequently that the Plaintiff was not entitled to both the said legacies, but to one legacy of 4000*l.* only; that therefore the Plaintiff and the other legatees in the Will and testamentary papers, except Dorothea Elizabeth Hanske, whose legacy of 100*l.* appeared to have been paid by the executors, and Elmer, who appeared not to have been living with the testator at his decease, were entitled to the legacies, in the schedule to the Report, exclusive of the annuities to Dorothea Elizabeth Hanske, after mentioned.

The Report, then stating the claim of Dorothea Elizabeth Hanske, insisting, that, as the testator had not in the paper of the 31st of December, 1802, given an annuity of 175*l.* to her, but had directed his executor to pay her the sum of 150*l.* per annum, as long as she should remain single, and 75*l.* per annum, if she should marry, without giving her son any interest in either of the said annual sums, the paper of the 22d of December, 1804, was not meant to be a revocation

[\* 38] of the annuity of 150*l.*, or 75*l.*, given by the first paper; but was a \* revocation of an annuity of 175*l.*, given to her by some other instrument for her and her son's use; and therefore she was entitled to both the said annuities of 150*l.* and 75*l.*, viz. to 150*l.* so long as she should continue single, and in the event of her marriage 75*l.* from such marriage; according to the first paper, and to 75*l.* per annum under the paper of 1804, absolutely; and, no other paper having been produced, the Master stated,

that he conceived that the annuity, given by the paper of December, 1802, was the annuity referred to, or intended to be referred to, by the testamentary paper of the 22d of December, 1804; and was thereby revoked; and that Dorothea Elizabeth Hanske was therefore entitled only to the annuity of 75*l.*, given to her by the last paper.

Exceptions were taken to the Master's Report: by the Plaintiff, claiming two legacies of 4000*l.*: by the executors, insisting, that the legacies by the first codicil to persons, who had legacies by the Will, were not additional; and by Dorothea Elizabeth Hanske, stating, that the Master ought to have certified, that the annuity of 75*l.*, given by the paper of 1804, was in addition to the annuity of 150*l.*, or 75*l.*, by the first codicil; that the annuity of 150*l.* was not revoked; that therefore she is entitled to the annuities by both the testamentary papers; especially as the testator has not by the paper of 1802 given or devised an annuity of 175*l.* to her, for her and his son's use, or in any other manner; or given to his son any interest in either of the annual sums of 150*l.* and 75*l.*, given by the first paper; and could not therefore mean by the recital in the last paper of 1804 to refer to the last-mentioned annuities, or either of them; but meant to refer to an annuity of 175*l.*, which he had given, or intended to give, to her by some other codicil or testamentary paper.

\* Mr. Richards and Mr. Bell, in support of the first Exception, by the Plaintiff.—Upon the general rule, established in the case of *Hooley v. Hatton* (1), upon a review of all the preceding authorities, this legatee is entitled to two legacies of 4000*l.*, given by two distinct instruments. The general rule being in his favor, the executors must show, that a substitution was intended: but these papers, so far from affording evidence of that, import the contrary; and the equality of the sums is immaterial. When the testator intended revocation and substitution, he has expressed it; and it is evident, that the legacy of 4000*l.* was not introduced into the second codicil from forgetfulness, as he must have had the former paper in contemplation; though the provision for the Plaintiff's mother is not correctly recited.

Mr. Grimwood, for the Executors.—The general rule, that legacies to the same persons in distinct instruments are accumulative, is repelled by internal evidence, that the second is mere repetition: *The Duke of St. Albans v. Beauclerk* (2), *Barclay v. Wainwright* (3); and from legacies, precisely the same, without any additional reason assigned, as there was in *Ridges v. Morrison* (4), the inference has great force. Upon the face of these two instruments nothing more

(1) 1 Bro. C. C. 391, n.

(2) 2 Atk. 636.

(3) *Ante*, vol. iii. 462; *Moggridge v. Thackwell*, i. 464, and the note, 466; *Allen v. Callow*, iii. 289; *Osborne v. The Duke of Leeds*, v. 369; *Currie v. Pye*, post, 462.

(4) 1 Bro. C. C. 389.

can be collected than a mere repetition of this legacy, with the same intention.

The exception, taken by the Executors, to the Report, [\* 40] \* that the legacies by the first codicil to persons, who have legacies by the Will, are additional, depends upon the same principle, resting upon the same authorities ; that the conclusion is repelled by internal evidence of the contrary intention. The legacies to Mr. Berens are the same sums, given for the same cause. He certainly can claim only one legacy. With regard to the others, considering the expression in the first paper, "in case I shall die unmarried," and the subsequent alteration of his circumstances, before the execution of the second paper, a connection formed, and a son born, whom he treated as legitimate, calling him his son, and giving him his own name, and a large legacy, the construction of the expression, "in case I shall die unmarried," is "in case I shall leave no family ;" and he may be considered as making, not a codicil, but a new disposition of his property by another Will ; making a large provision for those, who were then the first objects of his affection ; and then proceeding to his mother and other relations ; to whom he leaves smaller legacies than he had given by the former Will ; giving Mr. Berens the same sum, expressed in the same terms ; repeating the appointment of executors ; and the whole instrument importing a new Will in all respects, except as to the residue ; where he refers to his former Will.

Mr. Hart, for the Legatees, claiming legacies under the first and second Instruments.—The rule is now clearly settled, that legacies to the same persons by distinct instruments, whether of the same or unequal amount, are *prima facie* accumulative : that presumption of additional bounty being subject to be repelled by internal evidence ; and even before the cases of *Hooley v. Hatton* and *Ridges v. Morrison*, if the legacy by the second instrument was of inferior amount, it was \*additional. Here is no internal evi-

[\* 41] dence of substitution. The conclusion upon the two instruments is clear, that these small pecuniary legacies, given by the second, are additional marks of the testator's affection and bounty : but they cannot be a substitution for the much more considerable sums bequeathed by the former instrument. In the last sentence of this second paper he embodies it with, and treats it as part of, the former : in effect confirming all, that was contained in it, with some additions. The papers afford strong internal evidence of that intention. No reason appears for such a change in his regard for those near relations within the short space of three or four years. He did die unmarried ; and after the connection, that he formed, marriage was probably removed still farther from his contemplation. The identity of the legacies to Mr. Berens cannot be applied to the others ; and even in that instance the precise correspondence of the legacies is not inconsistent with the purpose of addition ; to be accounted for perhaps by an increase of his fortune, and conse-

quently of the executor's trouble: the instrument creating expressly farther duties.

Mr. Berens, in support of the Exception by Dorothea Elizabeth Hanske, claiming the annuities under both codicils.

1810, April 3d. The MASTER OF THE ROLLS [Sir WILLIAM GRANT]. —The questions in this cause, are first, whether the infant Plaintiff is entitled to one legacy of 4000*l.*, or to two distinct legacies of that amount: secondly, whether the legacies, given by the first codicil, are additional, or substitutions only for the former legacies. The point, whether the mere circumstance, that legacies, even by different instruments, are of the same amount, raises a presumption against their duplication, is upon the authorities left in [\*42] some degree of doubt. In the case of *Ridges v. Morrison* (1) Lord Thurlow, though professing to adhere to the case of *Hooley v. Hatton* (2), yet says, "where the same quantity has been given, and the same cause, or no additional reason, assigned for a repetition of the gift, the Court has inferred the testator's intention to be the same, and rejected accumulation;" and in another case (3) Lord Thurlow says, "Simple repetition, where it is exact and punctual, has been regarded as sufficient proof, that it is only intended for repetition."

Be that as it may, I think it extremely improbable in this case, that the testator intended to double the provision, which he originally made for his natural child. That provision was made by a codicil very soon after the birth of the child: about two years afterwards, while the child was still a mere infant, he made another codicil: the principal purpose of which seems to be to reduce the allowance to the mother of the child; which he erroneously states at 175*l.* per annum for the use of herself and her son. That he reduces to an annuity of 75*l.* for her own use. As he was taking away a part of the provision, which he conceived himself to have made both for the mother and the son, it was not unnatural, that he should repeat the bequest to the son; showing that he still meant, that his son should take his portion without diminution: but there is no probability, that at so early a period of his life he was intended to have so very considerable an addition to his portion; and that the testator meant to put one sum of 4000*l.* under the management of his brother, and another sum of that amount under the management of Mr. Berens and his brother. It [\*43] cannot be conceived, that the testator intended two trusts, and two distinct fortunes to manage. Therefore upon the internal evidence, arising out of the Will, and the object of the testator, I think he intended this infant Plaintiff to have only one portion of 4000*l.*

As to the other question, the testator sets out by making what is

(1) 1 Bro. C. C. 389.

(2) 1 Bro. C. C. 390. n.

(3) *Moggridge v. Throckmorton*, ante, vol. i. 464. (See 473.) 3 Bro. C. C. 517.

called the first codicil, as if he meant an entire new Will; and I should have thought it intended as a substitution for the former Will, except from the circumstance, that towards the end he refers to the former Will; and recognizes its existence. It must therefore operate; except so far as it is revoked; or as the second contains provisions, inconsistent with it. The question is, whether, as he gives legacies by this second testamentary paper to most of those persons, who have legacies by the Will, he intended, they should take both sets of legacies, or only those, given by the second instrument. All, except one, are legacies of different sums. The rule is, that, where the sums are different, and the instruments are different, there is no ground for holding the second a substitution for the first. That is the case with respect to all the legacies, except that to Mr. Berens; which is the same in amount; and is expressed to be for the same cause: viz. his trouble as executor. According to all the authorities a legacy of the same sum, for the same cause, given by a codicil, is repetition, and not addition. That legatee is therefore entitled to one sum only; and in all other respects I concur with the Master.

The Exceptions were therefore disallowed, except as to the legacy to Mr. Berens.

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In what cases legacies, given by different instruments, are to be held accumulative, and when the gift by a subsequent instrument must be considered as a substitution for a legacy given by a former will or codicil, see *ante*, notes 2, 3, to *Moggridge v. Thackwell*, 1 V. 464.

[\* 44]

BARNARD v. YOUNG.

[ROLLS.—1810, APRIL 3.]

CONTRACT for re-payment of a debt with legal interest, or, at the option of the creditor, to transfer so much Stock as it would have produced on the day it was payable, void as usurious: the principal and interest being secured, with the chance of a rise of the Stock: not therefore like a contract to replace Stock absolutely; which might fall (a).

THE Bill, filed by the assignees under a Commission of Bankruptcy against Keighley, Ferguson, and Armstrong, prayed that the Defendant Young may produce an assignment to him by Keighley

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(a) Any device to cover a usurious transaction will be unavailable. See, *ante*, note (a) *Spurrier v. Mayoss*, 1 V. 527.

It is said that if the agreement be clearly usurious, it is void, though the parties did not intend it to be so, and were ignorant that such was the legal effect of their contract. Chitty, Contr. (5th Am. ed.) 703; *Enderby v. Gilpin*, 5 Moore, 588; *Solarte v. Melville*, 7 B. & C. 430; *Maine Bank v. Butts*, 9 Mass. 55; *Manhattan Bank v. Osgood*, 15 Johns. 152.

If it clearly appears that there was no intent on the part of a bank to take more than lawful interest, although in charging discounts they reckon ninety days as

of the sum of 8500*l.* East India Stock; charging that it was illegal and void; as being founded on a contract usurious, and also void under the Stock-jobbing Act.

The answer of the Defendant Young stated, that in August, 1794, the Defendant was applied to by Keighley and Beckford, to lend them 10,000*l.*; and, to induce him to do so, they represented that the title-deeds of an estate in the West Indies should be deposited with the Defendant as a collateral security, exclusive of the joint and several bond of Beckford and Keighley, and a bond from the Defendant Williams for the production and deposit of the title-deeds with Young. He accordingly advanced the 10,000*l.*; and Beckford and Keighley gave their bond, dated the 12th of August, 1794, for payment of 10,000*l.*, with 5 per cent. interest on the 12th of February next; and Williams gave his bond of the same date in the penalty of 20,000*l.*, reciting the loan of the Defendant Young upon the joint and several bond of Beckford and Keighley, and upon their promising and undertaking farther to secure the re-payment thereof with interest by depositing with the Defendant all the writings concerning said mortgaged premises, and upon Defendant Williams's undertaking to guarantee the delivery of such writings; and declaring, that the bond should be void, if Beckford and Keighley, or either of \*them, &c. should deliver the deeds to      [\*45] the Defendant, as a collateral security.

The Answer farther stated, that the deeds were not delivered; nor the 10,000*l.* repaid; and upon the Defendant's application in March 1795, Keighley proposed, as a collateral security, to give a lien upon the said 8500*l.* East India Stock. The Defendant agreed to the proposal: and by a deed, dated the 31st of March, 1795, reciting the loan, &c. and that, to prevent the Defendant's being a loser by the rise or difference in the price of stocks at the time of repayment, Beckford and Keighley had proposed to transfer into the names of the Defendant, his executors, &c. 16,096*l.* 11*s.* 7*d.* 3 per cents. being so much stock as upon the 12th of February last, when the principal and interest, secured by the said bond, became due and payable, could have been purchased with 10,000*l.*, or to pay the said 10,000*l.*, at the option of the Defendant, his executors, &c., and that in order farther to secure to the Defendant, his executors, &c. such transfer of stock, or payment of the said 10,000*l.* and interest, Keighley had proposed and agreed to assign and make over to the Defendant the said principal sum of 8500*l.* East India Stock, and the interest of Keighley therein, it was witnessed, that Beckford and Keighley did covenant with the Defendant, that they, their heirs, executors, or administrators, would on the 30th of September next

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the fourth of a year, a note taken and thus discounted will not be adjudged usurious. *Utica Ins. Co. v. Kip*, 3 Wend. 369. See also *N. Y. Fireman Ins. Co. v. Sturges*, 8 Cowen, 664; *Utica Ins. Co. v. Tilliman*, 1 Wend. 555.

So it has been held that taking interest for a part of a year, computed on the principle that a year consists of 360 days, or twelve months of 30 days each, is not usurious, provided the course is adopted *bona fide*, as an easy and practicable one, and not a cover for usury. *Agricultural Bank v. Bissell*, 12 Pick. 586.

transfer into the name of Defendant, his executors, &c. 16,096*l.* 11*s.* 7*d.* 3 *per cent.* annuities, or pay to him or them said 10,000*l.*; and in either case would then pay to Defendant, his executors, &c. the interest of said 10,000*l.* at 5 *per cent. per annum*; and it was thereby farther witnessed, that said James English Keighley did bargain, sell, &c. to Defendant said principal sum of 8500*l.* East India Stock, then vested in the names of Williams and Thomas Keighley upon the trusts, before \* referred to, upon trust for Defendant, his executors, &c. with a proviso to be void, if Beckford and Keighley or either of them, &c. should on the 30th of September next transfer into the name of the Defendant, his executors, &c. 16,096*l.* 11*s.* 7*d.* 3 *per cent.* annuities or pay 10,000*l.* sterling and interest at 5 *per cent.*

The Answer then stated, that neither was the stock transferred, nor the money paid: and that the whole 10,000*l.* and interest remains due; that the Defendant had no intention of getting undue interest; submitting, that, if he is not entitled to the option to have the transfer of stock, instead of repayment of the 10,000*l.* the indenture of 1795 is to be considered a collateral security for the repayment of the principal and interest; and contains a valid assignment of the East India Stock for that purpose.

The cause stood for judgment.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—It was objected that Young's assignment was void as being usurious; and, if it is usurious, the consequence must follow, that it is wholly void. The party, in whose favor an usurious contract has been executed, cannot make use of it for any purpose whatsoever. The other party does not seek to have that contract cancelled, or other relief directly against it, but only to enforce his own right; contending, that it is not to be impeded by having this usurious contract set up to obstruct it.

I am of opinion, that the contract is usurious; as it reserves the capital, with legal interest upon it, and likewise a contingent advantage; without putting either capital or interest in any kind of risk. The case of *Forrest v. \*Elwes* (1) differs from this in the very point, in which I conceive the usury to consist. In that case the objection, though at first made, was properly given up: as, though it is true, if the stock had risen, the lender might have had more than principal and legal interest, yet on the other hand, if it had fallen, he would have had less; as he had no option to have stock or money; but the borrower could have discharged himself by merely replacing the stock. Here the security is of this kind. The lender is, at his election, to have his principal and interest, or to have a given quantity of stock transferred to him. His principal never was at any hazard; as he was at all events sure of having that with legal interest; and had the chance of an advantage, if the stock rose. It was usurious to stipulate for that chance. In

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(1) *Ante*, vol. iv. 492.

fact the stock did rise ; and, if the contract had been performed, he would have had principal, interest, and a very large premium.

Therefore, though it was not probably so intended, this is in fact an usurious contract.

THE Court of King's Bench adopted the doctrines laid down in the principal case, and gave judgment accordingly, in *White v. Wright*, 3 Barn. & Cress. 276, where it was also determined, that the objection on the score of usury could not be evaded by the device of taking the two alternatives of the contract by two separate instruments: see *Roberts v. Trenayne*, Cro. Jac. 508.

### BEAN, *Ex parte.*

[1810, MAY 18.]

BANKRUPT cannot supersede his Commission with consent of all the creditors, while under commitment by the Commissioners.

Bankrupt cannot supersede his Commission before surrender, [p. 48.]

A PETITION was presented by a bankrupt, that the Commission against him should be superseded, upon the usual certificate of the consent of all the creditors, who had proved debts under it (1); but the Commissioners farther stated by their certificate, that the bankrupt had not passed his examination ; but was committed by them for not answering to their satisfaction ; and, having been \* twice remanded, remained still in custody under that [\* 48] commitment.

Mr. Wear, in support of the Petition.

The Lord CHANCELLOR refused to make the Order: observing that the application under such circumstances was perfectly new ; it was settled, that a bankrupt cannot supersede his Commission, until he has surrendered (2) ; and, being under commitment for not answering to the satisfaction of the Commissioners, he must be considered as guilty of a great offence (3).

1. ANOTHER report of this case may be found in 1 Rose, 211.

2. As to the excepted cases in which a commission, which has been opened, may be superseded before the bankrupt has surrendered, see, *ante*, notes 1, 2, to *Ex parte Stokes*, 7 V. 405.

3. Notwithstanding the *dictum* in the principal case, it is now settled, that a commission may be superseded on the petition of a bankrupt who is under commitment: *Ex parte M'Gennis*, 18 Ves. 289: *Ex parte Brown*, 2 Swanst. 290.

(1) This cannot be done now until after the second meeting. See the General Order, August 21st, 1818 ; 3 Madd. 392; *Ex parte Lau*, 4 Madd. 272.

(2) *Ante, Ex parte Stokes*, vol. vii. 405; *Ex parte Jones*, viii. 328; xi. 409; see *Ex parte Whittington*, Buck, 235.

(3) This case is over-ruled: *Ex parte M'Gennis*, post, vol. xviii. 289; 1 Rose, 60, 84; *Ex parte Brown*, 2 Swanst. 290.

## LEWIS v. MADOCKS.

[1810, MAY 23, 25, 26.]

EFFECT of a contract on marriage by bond to devise, convey or assure, all such goods, personal estate and effects, that the husband should at any time during the joint lives of him and his wife be possessed of, to the use of them and the survivor; attaching on capital; not income, unless laid up as capital; admitting therefore expenditure, and debts, in a fair application of income, not liable to a minute account. On that principle an estate, purchased by the husband with money, partly his own, partly borrowed on his personal security, and some paid off by him, was after his death held to belong, not to the trust, but to the heir, charged for the benefit of the trust with the money, that was his own, the debts paid on account of that purchase, and expenditure in repairs, improvements, &c. c. (a).

THIS cause (1) came on for farther direction upon the Master's Report; stating, under the inquiries, directed by the Decree, that the estate was purchased by \*Richard Madocks from different persons for 1600*l.*; of which 600*l.* was his own money; and the remainder, viz. 1000*l.*, with 21*l.* for the expenses of the conveyance, borrowed from several persons upon the security of his bonds and notes: of which he afterwards, in 1780, paid 300*l.* and in 1781 or 1782, 200*l.*: the remaining sums, viz. 400*l.*, 80*l.*, 21*l.* and 20*l.* were still due to the persons, from whom they were borrowed. The Master did not find, that any part of the personal estate was laid out in the purchase of real estate, except as aforesaid. Besides the sum of 521*l.*, so borrowed, and invested in the purchase, and remaining unpaid, with an arrear of interest, the debts of Richard Madocks, including his funeral and testamentary expenses, amounted to 186*l.* 17*s.* 7*d.*; the whole whereof were paid by the Plaintiff Ann Lewis. The Report farther stated, that after the death of Madocks the Plaintiff Ann Lewis before her second marriage laid out several sums, amounting to 353*l.* 14*s.* 5*d.* in repairs and lasting improvements upon the estates purchased; and in redemption of the land tax. The amount of the personal estate, left at the death of Madocks, amounted to 573*l.* 0*s.* 6*d.*

Mr. Richards, Mr. Hart, and Mr. Roupell, for the Plaintiffs.—The real estate, that was purchased by Richard Madocks, must in a Court of Equity be considered merely as \* his personal property, bound by this bond: in which must be found

(a) Where a man has covenanted to lay out money in the purchase of lands, or to pay money to trustees to be laid out in the purchase of lands, if he afterwards purchases lands to the amount, they will be affected with the trust; for it will be presumed, at least until the contrary absolutely appears, that he purchased in fulfilment of his covenant. In every such case, it must be clear, that the land has been paid for out of the trust money. 2 Story, Eq. Jur. § 1210, 1260. See *Boyd v. McLean*, 1 Johns. Ch. 582; *Murray v. Lylburn*, 2 Johns. Ch. 442; *ante*, note (a); *Perry v. Phelps*, 4 V. 108.

(1) Reported, *ante*, vol. viii. 150.

the real intention of these parties ; the terms on which the marriage was contracted : understood by the wife and her family as the rule, by which the property was to be dealt with. The effect of that engagement is unquestionably, that debts, fairly contracted, must be first paid. All that can be fairly considered his acquisition, within the meaning of this bond to be held for the use of himself and his wife and the survivor, is the surplus, beyond their maintenance, and debts, contracted by enabling him to acquire property. His act, placing that surplus under circumstances, withdrawing it from that object, was upon equitable principles a fraud : whether the purchase was made by personal property, on which, being his own, the covenant attached, or by the medium of a loan ; and the consequence is, that this Court will pursue that money ; and consider the real estate, in which it was thus unduly invested, as property of that description it originally had, and ought to have preserved. Clearly it would have been so considered, if the conversion had been into a long term of years ; and can the intention be supposed, that the whole object and effect of this settlement should be determined by his choice of an estate of one species, rather than another ? One mode of defeating that object was left to him : the power of expenditure, even the most improvident. With that power of spending the whole, or contracting debts to the full amount, he was entrusted. Relying on the natural regard for his own interest they were content to incur that hazard : but, subject to that single exception, he was not at liberty to determine, that this provision should be fruitless.

The true mode of treating this case is by considering the property as personal estate, with all its incidents ; not merely restoring it, as when it was laid out ; but pursuing \*it in that [\* 51] shape. No other Decree will effectually correct the fraud ; and place the widow in the situation, in which she ought to stand. As personal property the fund would have accumulated in a greater proportion than it could in the shape of real estate ; the improvement of which in a course of years forms the compensation for a diminished income.

If however this is considered as real estate, the points, to be ascertained by inquiry, (the Report finding, that he had no real estate,) are, what amount of personal property was laid out in this estate ; what proportion was his own ; what was borrowed : how much was paid off ; and, not only what the widow has laid out in improvements, to which she is clearly entitled, but also what was laid out by Richard Madocks : as to which the Decree has not directed an inquiry : the fact being, that he laid out money in building ; which is equally a conversion of personal property into real estate. The manner, in which this purchase was made by the husband, by a conveyance to a trustee, so as to prevent the right to dower, is a mark of fraud.

Sir Samuel Romilly, Mr. Bell and Mr. Phillimore for the Defendant.—This is a question certainly of extreme importance, from the very new doctrine it involves, and the consequence of a Decree,

giving relief to the extent, that is desired ; directing a conveyance from the Defendant to the Plaintiffs, or such persons as they shall direct. The Plaintiff Mrs. Lewis must be taken to consider this real estate as in the nature of personal estate in her ; as she could pass her real estate by fine only : and, considered as real therefore, there is no preference for a conveyance to such uses as her husband shall [\* 52] direct. Two considerations arise : \* first what under this bond is to be deemed personal estate of the husband : secondly, whether his personal property, invested in real estate, can be followed by the persons beneficially entitled. The books afford very little, that can assist in this discussion. The Plaintiffs have not very distinctly stated, what was to be considered as the personal property of Richard Madocks. All, that can be so considered for this purpose, is the clear residue of his personal property, after satisfaction of all his debts, and after setting apart a sum sufficient to answer the necessary and unavoidable occasions of a man in the course of his life. The Plaintiffs must contend, that any money or personal property was, the instant that it came to his hands, affected by this bond ; though it was to pass from him immediately afterwards. Consider the consequences of that conception of the effect of this bond. First, he would be charged with all his receipts in the course of all the transactions of his life ; but would not be credited with his disbursements : if, for instance, having a real estate, he improved it by draining, that expenditure must have been considered as personal property, falling within the meaning of this engagement ; as applied in the expectation of improvement ; even though a loss had been incurred

It seems, however admitted, that this is not to be carried to such an extent. Something must be allowed for subsistence : but what is the conclusion upon expenditure in objects of mere pleasure : an excursion to a watering-place : a picture, purchased at a price beyond the actual value ? Can a Court of Equity put upon any settlement such a construction ; that every item of expenditure must be canvassed ; for the purpose of determining, whether it could be considered property in his hands within this provision : a construction,

[\* 53] by which the object and effect of that contract, their mutual comfort and \* happiness, must be entirely disappointed ; as an account so strict must prevent any application for that purpose ? The consequences, with reference to debts, are still more extraordinary. If he had borrowed by simple contract this sum of money, which he laid out in the purchase of an estate, leaving personal property sufficient to answer the debt, that application would be opposed by this bond ; attaching upon all personal property, that he was once possessed of.

The only mode of doing justice in this case is by permitting the Plaintiffs to recover what damages they can obtain at law for breach of the condition. This Court cannot in any manner ascertain the damages they have sustained. If, no money passing directly by way

of loan, the husband had made a mortgage of the estate for 1000*l.* the excess of price beyond the 600*l.*, his own money, could that sum of 1000*l.* be represented as having become part of his personal estate? Yet the distinction cannot depend upon the form of the conveyance. The question is, whether this money was ever substantially his personal estate; and no more than 600*l.* can be so represented. Then are the Plaintiffs entitled to have so much of the estate as was purchased with that sum considered as personal property within this bond; and is it possible in this Court so to follow the property? Where it can be clearly shown, that property, clothed with a trust, has been converted, it may be followed: but the object of this bond was no more than to constitute a debt to trustees in favor of the wife and children: a bond with a penalty: to become void, if he should settle in the manner specified: not a covenant: though resembling one in many respects. The instrument must therefore receive the same construction here as in a Court of Law. Those, who enter into these loose engagements, involving difficulties so numerous, must not expect this \*Court to [\*54] extricate them from the consequences. The only safe course would be to require them to point out, what was at a particular period personal property, capital, in a fair sense ascertained and set apart after providing for their general expenditure. This is not a case of fraud; as *Jones v. Martin* (1), and *Randall v. Willis* (2); nor upon an executory article; a distinction relied on by Lord Loughborough in *Randall v. Willis*. If it is compared to the case of a trustee, laying out trust money, or, which has some analogy, a husband, purchasing land with money, vested in trustees under his wife's settlement, it was never held, that, if the purchase was made partly with money of the husband or trustee, the estate should belong to the wife or *cestui que trust*: but the equity administered was, that the fund should be followed; and restored in the same plight, as if it had never been invested: *Lane v. Dighton* (3). The utmost relief, that can be given in this case, is to admit the claim to any property, that can be traced, so as to be made available; looking to the period of the husband's death.

Mr. Richards, in reply.—The Court having already declared the personal estate, of which the husband was possessed during the coverture, liable to this bond, it is too late to argue upon the difficulty of following up that declaration. This relief is sought after the death of the husband, not in competition with creditors; who are all paid; not requiring from the representative any account of expenditure, provident, or improvident: no doubt now existing as to the circumstances of this purchase, with 600*l.*, his own money, and 1000*l.* borrowed; of which he afterwards paid off \*500*l.* That sum, paid off by him, must be considered [\*55] his money; as also what he laid out in substantial improve-

(1) 3 Anstr. 882; *ante*, vol. v. 266, n.

(2) *Ante*, vol. v. 262; see the note, 276.

(3) Amb. 409.

ments and repairs : though by some omission in the Decree an inquiry has not been directed upon that head. It is certainly competent to a man to settle specific articles of furniture, &c. which are frequently settled to the separate use of a married woman ; and are protected by this Court from execution ; and it must be equally competent to him to bind himself with regard to any future personal estate. The conclusion is, that this real estate must belong to the Plaintiff. In the case of a resulting trust from a purchase with the money of another there has always been a question of evidence, how it was traced. In this case it is clear, that the husband could not lay out in land a shilling, that was not subject to this trust, created by his own engagement. The manner of procuring the money, whether the fruit of his own industry, or devolving on him from others, cannot raise a distinction. By his contract he had disqualified himself to possess any personal property, which was not to be the property of his wife, surviving him ; and, being clearly her property in that case, can he affect her vested right by putting it in another shape ? It is impossible to state, or conjecture, any description of property, that could be invested in this purchase, discharged of the trust. The same principle, that would clearly entitle the widow to repayment out of the estate, gives her a title to the estate itself. Purchased with money, which the event has ascertained to be her's, it is a trust for her ; and the equity, which would have bound her husband, must prevail against his heir.

The Lord CHANCELLOR during the argument said, he could not adopt the construction, that annual produce, for instance, dividends of \* stock, was property acquired during the coverture in the sense of this bond ; except only to the extent, in which the husband himself might think proper to lay up that produce as capital : otherwise they would not be at liberty to spend a shilling : but in providing for their maintenance and comfort they could not go beyond income. With regard to the difficulty, there is no difference between a marriage settlement, attaching upon every chair and table, and direction in a Will, that such specific articles shall go as heir-looms.

1810, May, 26. The Lord CHANCELLOR [ELDON] having particularly stated the Bill, pronounced the following judgment.

It has been contended under this Bill, that the sums borrowed by Richard Madocks, are to be considered as within this bond ; though taken with one hand, and with the other transferred immediately. It cannot be considered as the purchase of an equity of redemption ; no mortgage having been made to the persons, who lent the money, making up the sum of 1021*l.* It was lent in various small sums on his personal security merely : some of the lenders not even taking security by specialty. He afterwards paid off two sums of 300*l.* and 200*l.* If those payments were made out of his own funds, there is no principle, on which the 600*l.* can for this

purpose be considered his personal estate, that does not equally require the Court to hold, that those sums also are to be considered: but the Master's Report does not ascertain, from what funds those two sums were paid off, so as to preclude inquiry: if it is desired. *Prima facie* the sum of 600*l.* and those sums are all on the same footing, to be considered as his personal estate laid out: unless an inquiry is prayed, whether the funds, which supplied those \* payments of 300*l.* and 200*l.*, was such in its nature, as to entitle the heir, taking the real estate, to have that fund not considered as personal estate, so laid out.      [\* 57]

I still consider the declaration, that the personal estate, of which the husband was possessed during the coverture, is liable to this bond, right: but the direction for inquiries is short in one respect: it ought to have gone farther; by what funds, and how acquired, he paid off these sums. A great proportion of the debts, about 186*l.*, are such as in the ordinary course of living in the last year of his life a man would incur; with the exception of some small quit-rents; and those also would be due from him in the course of a proper application of his income; and this general observation applies to all the items; that they can hardly be represented as debts incurred, so that the payment of them would be a breach of his obligation under this bond. It would be entering into impracticable minuteness to give the wife credit against the real estate for any of the items paid in that schedule. If persons will enter into an engagement, so difficult in construction and application, they must not expect from a Court of Justice relief so minute in that respect.

One great question is, whether this estate belongs to the heir or the wife. The claim of the wife is put in this way; that personal property, bound by the trust, or obligation, whatever it is called, of this bond, is traced into the purchase of a real estate; which estate must therefore be her's: but I do not know any case, in its circumstances sufficiently like this, to authorize me to hold that doctrine. I am prepared to say, that the personal estate, bound by this obligation, and which has been laid out in this real estate, is personal property, that may be demanded out of the real estate; that the estate \* is chargeable with it: but it was not so purchased with it, that the estate should be decreed to belong, not to the heir, but to the wife: the effect of the transaction being no more than that the husband, having 600*l.*, his own money, buys an estate for 1621*l.*; not charging the estate with the 1021*l.* borrowed, and purchasing the equity of redemption; but by bonds and notes making himself a personal debtor for the different sums borrowed; paying off some afterwards; and leaving the rest unpaid. The case of *Lane v. Dighton* (1) does not authorize more than this; that the sum of 600*l.*, his own money, being traced into an estate, the estate is liable to that sum; and clearly must answer it with interest from his death (2).

(1) Amb. 409.

(2) *Ante, Lench v. Lench*, vol. x. 511; 1 Ball & Beat. 285.

As to the sums of 300*l.* and 200*l.*, not precluding inquiry, if it is desired, out of what funds, and how acquired, those sums were paid off, my present opinion is, that those sums also, appearing *prima facie* to have been applied in paying debts, must be considered as personal estate: capital; even if composed of savings: but I am not authorized to say, that was the fact; and therefore, if desired, there must be an inquiry: but there is high probability, that those two sums will fall within the meaning of this instrument, as personal estate, to which the wife is entitled, also with interest from her husband's death.

The omission of an inquiry as to the money, laid out by him in building, was a slip in the Decree. An inquiry must therefore be directed, out of what fund that expenditure was made; and how it was produced; with the view to determine, whether that also ought to be considered an item of the personal estate, to which she would be entitled; and as to lasting improvements, made by the [<sup>\* 59</sup> wife, that <sup>\*</sup> was money *bona fide* laid out: as to that therefore she is entitled to the inquiry; and as to the other sums borrowed, and not paid off, as between the estate and the administratrix, the money, borrowed for the purchase of the estate, must be considered the debt of the estate.

The Decree, as finally pronounced, declared the Plaintiff entitled to the sums of 600*l.*, 300*l.*, and 200*l.*; with interest from the death of Richard Madocks; and as to the house, built by him, &c. an inquiry was directed, out of what fund that expenditure arose.

SEE, ante, the notes to S. C., 8 V. 150.

PAGE, *Ex parte.*

[1810, MAY 30.]

CONTUMACIOUS Obstruction of the Messenger under a Commission of Bankruptcy treated as a Contempt; though acting under the authority of the Commissioners, given by Statute; not under the Lord Chancellor's Order in Bankruptcy; as in the case of Commitment; upon which the Lord Chancellor can do no more than grant the Writ of *Habeas Corpus*, as holding the Great Seal; not by his authority in Bankruptcy.

The Messenger in Bankruptcy is to enter and seize at his own hazard the property of the Bankrupt: but if he enters the house, and seizes the property of another, acting under authority, he cannot be turned out: but the party must take his remedy by Law; and contemptuous language, or force, is a Contempt of the Great Seal.

Whether after execution of the Warrant of Seizure of Commissioners in Bankruptcy the Messenger, having given up possession, can again seize without another Warrant, *Quære.*

THIS Petition was presented by the Messenger under a Commission of bankruptcy; praying, that a person, named Craggs, may be committed for a contempt \* by obstructing the [ \* 60] Petitioner in taking and holding possession under the warrant of the Commissioners of premises, the property of the bankrupt, a public house in Rosemary Lane. The Petition stated, that the person, first sent to take possession, was on producing the warrant obstructed by Craggs; who said, the stock was his, and he would resist the warrant: the bankrupt being there at the time; that in consequence of Craggs's opposition the man was not able to take possession; and went away: but the Petitioner afterwards sent another person; who took possession by force.

Craggs upon his examination before the Commissioners swore, that he purchased the stock from the bankrupt for 490*l.*; and the affidavits against the Petition represented, that the bankrupt's presence was accidental; being called in, as he was passing by, to take some liquor.

Mr. Hart, in support of the Petition. Mr. Richards, against it.

The Lord CHANCELLOR [ELDON].—It was long doubted, whether the obstruction of the messenger is a contempt of the Great Seal; whether for that purpose it was not necessary to procure an Order of the Lord Chancellor for delivering the property to the messenger; and, if the question stood unprejudiced by decision, I have no difficulty in saying, it ought to be so decided; as, when an Act of Parliament gives authorities to the Commissioners, their acts are done under the authority of that Statute, not of the Lord Chancellor. Accordingly, when they commit, I can do no more than grant a warrant of *Habeas Corpus*, to bring up the party, by the authority I have, not in bankruptcy, but as holding the Great Seal.

Lord Hardwicke has however decided, \* that the obstruction of the messenger is a contempt; and that precedent [ \* 61] has been since followed; so that I am bound.

With regard to the circumstances of this case, this is a warrant to enter the house, and seize the effects, of the bankrupt; and, supposing it to be my Order, the person, executing it, is to seize the property of the bankrupt, not of any other person; and is to do that at his own hazard; yet Lord Hardwicke (1) laid down, what has been acted upon ever since, that, if the person, executing the process, enters a house, and seizes property, not belonging to the bankrupt, making that entry and seizure under color and by virtue of that authority, he cannot *brevi manu* be turned out; that contemptuous language used, or force opposed, to him is a contempt of the Great Seal; authorising this summary proceeding; and the party must take his remedy by Law. Upon an application for a contempt however I must consider, whether the party acted under a mistake, or contumaciously towards the Court; and, if it was necessary to determine, whether the act, complained of by this petition, is a contempt, to be punished in this way, I must upon the evidence direct an issue; to try, whose property this is: but under all the circumstances, the possession being now held under the Commission, and this party having the power to bring an action, if he thinks proper, in this particular case I dismiss the petition, without costs.

I cannot hold the man, sent first, to have been in possession; the Petition stating, that he could not take possession; but, having been actually inside the house, if he afterwards quitted it, one question would be, whether the warrant was not spent; and another warrant necessary.

1. This case is also reported in 1 Rose, 1.
2. As to the power of commissioners of bankrupt to commit to prison, and the mode in which any abuse of that authority is to be redressed, see, *ante*, the note to *Taylor's case*, 8 V. 328. To what extent commissioners possess an independent judicial character, see the note to *Ex parte Scarth*, 14 V. 204; and the note to *Ex parte King*, 11 V. 417.
3. There is no jurisdiction in bankruptcy to make a summary order, that a messenger who, in the execution of his duty, has taken possession of goods as the property of the bankrupt, shall, upon the application of a person claiming the goods, deliver them up; the claimant must assert his right by an action: *Ex parte Craggs*, 1 Rose, 25. As to the mode in which any contumacious resistance of the messenger will be dealt with, see the note to *Ex parte Dixon*, 8 V. 104.

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(1) Mr. Eden, in his Treatise on the Bankrupt Law, considers this to have been laid down by Lord Harcourt; and refers to the *Anonymous Case*, 2 Eq. Ca. Ab. 98.

HALL, *Ex parte* (1).

[1810, MAY 30.]

ONE Partner bound by the other's signature of a Bankrupt's Certificate after dissolution of the partnership.

Bankrupt's Certificate, though it would be void, if obtained by money, even without his privity, was not stayed on mere suspicion, not supported by affidavit, and denied by the bankrupt.

UNDER a Commission of Bankruptcy a joint debt was proved by Langston on behalf of himself and his partner Hall. Afterwards their partnership was dissolved, in 1807 ; and after that dissolution Langston signed the bankrupt's certificate without the consent of Hall ; who presented a petition, that the certificate may be stayed ; alleging farther, that, the Solicitor under the Commission having arrested the bankrupt, and Langston, who was an assignee, for the expenses, the latter obtained his discharge by signing the certificate. The bankrupt by affidavit denied any knowledge of that fact.

Mr. Roupell, in support of the Petition, insisted, that the partnership not subsisting, when the certificate was signed, the one had no right to sign, and conclude the other, not then his partner ; and, upon the other point, that if, according to the suggestion of the Petitioner, contradicted certainly by the bankrupt, Langston's inducement to sign the certificate was his discharge from the arrest, the effect was the same, as if money had been received ; which, though received without the knowledge of the bankrupt, vitiates the certificate.

The Lord CHANCELLOR [ELDON].—The point, that the act of one partner binds the other, as to a great variety of transactions (2), has been so repeatedly held in bankruptcy, that it is not to be disturbed. The only distinction of this case arises upon the intermediate dissolution ; whether that makes a \*difference. As [\* 63] to that debt the partnership was not dissolved. The debt was still due to both ; and must remain ; though nothing of the old concerns had been left but that debt.' That objection therefore has no foundation.

With regard to the other objection, it is very hard : but it is settled, that, if a friend or foe of the bankrupt gives money, as an inducement to sign the certificate, though the bankrupt was in no degree privy to that transaction, and never would have consented to it, the certificate is void (3) : but though that must be the consequence, if I was satisfied of the fact, the proposition, that upon such circumstances as are now before me, raising a suspicion, that something of that nature has passed, the certificate is to be withheld by the Great

(1) 1 Rose, Bank. Cas. 2.

(2) *Ex parte Mitchell*, ante, vol. xiv. 597 ; see the note, 598 ; *Ex parte Hodgkinson*, post, vol. xix. 291.

(3) *Ex parte Butt*, ante, vol. x. 359.

Seal, the bankrupt swearing, that he was not privy to it, and the other parties, Langston and the Solicitor, not making any affidavit, goes to a great extent; and the refusal of the certificate removes the only means, by which the fact, whether that species of dealing has taken place, can be put in a course of trial. It is said, that the Petitioner cannot compel Langston and the Solicitor to swear: but neither can the bankrupt. In such a case therefore, amounting to no more than a suspicion, the truth of which can be put in a course of trial only by granting the certificate, I am not justified in withholding it.

The Petition was dismissed. —

1. This case is also reported in 1 Rose, 2.

2. As to the transactions in which one partner can bind his co-partners, and those other cases in which the act of a single partner will not entail any responsibility upon the rest, see, *ante*, note 2 to *Burn v. Burn*, 3 V. 577; note 1 to *Ex parte Bonbonus*, 8 V. 540; and the note to *Ex parte Mitchell*, 14 V. 597.

3. The 125th section of the statute of 6 Geo. IV. c. 16, makes all contracts and securities, given to induce creditors to sign a bankrupt's certificate, void. For many purposes, in bankruptcy, affidavits, stating hearsay and belief, may be sufficient to ground an inquiry when the case is pregnant with circumstances of suspicion: *Ex parte Boyle*, Buck. 248: but, where a bankrupt has obtained his certificate, that will not be recalled without a clear case made out against him: *Ex parte Hood*, 1 Glyn & Jameson, 221. There is no doubt that, if it be clearly established that a certificate was unduly obtained, it may, though after allowance, be recalled: *Ex parte Cawthorne*, 19 Ves. 260. But this power will be exercised with discretion: see the note to *Ex parte Mawson*, 6 V. 614: provided the revocation will affect the bankrupt only, there will be no room for hesitation; but, when the certificate has been allowed for years, making it probable that, on the faith thereof, many persons have entered into dealings with the bankrupt, and that they would be materially injured if it were to be revoked, a reference will be directed to ascertain that fact: *Ex parte Tallis*, 1 Ball & Beat. 322: and, if it appear that injustice and hardship would arise to innocent persons from recalling the certificate, it will, in consideration of them, be allowed to stand: *Ex parte Reed*, Buck, 430.

## GREEN v. STEPHENS.

[1808, DEC. 6, 23. 1809, JAN. 31; FEB. 1, 3. 1810, JUNE 2. ANTE, VOL. XII. 419.]

**DEVISE** by very general words, "all Messuages, Lands," &c. and all other his real and personal estate, including money, in trust to be invested in land, and settled; though particularly charged on the estates devised.

Execution of a direction by Will to convey lands, to be purchased, by raising cross-remainders among more than two upon the intention, by implication; without regard to the words "several and respective" in the limitation to the heirs (a).

Distinction upon this subject between devises by a general description to a class of persons, not ascertaining the number, and to individuals named.

The reasoning in the implication of cross-remainders upon the expression "all the premises," &c. not satisfactory, [p. 75.]

Distinction between a legal devise and an executory trust by Will: in the latter the actual intention, if it is to be collected, is regarded in a much greater degree than in the construction of a legal devise by the same instrument, [p. 76.]

THE Decree, pronounced by the Lord Chancellor [Erskine], in this cause (1), declared, that the Plaintiff was under the Wills of George Philips and John Stephens entitled to have the sum of 9453*l.* 2*s.* 10*d.* paid out of the personal estate of John Stephens, (upon whom the trust under the Will of Philips had devolved), and laid out in the purchase of lands, to be settled to the uses of the Will of Philips; with interest at the rate of 4*l.* per cent. from the death of John Stephens.

The Lord CHANCELLOR did not direct a case upon the question of cross-remainders, not conceiving, that it was necessary to consider that question; but intimated, that, if it had called for decision, that course should be taken.

A Petition of Re-hearing was presented by the Defendants; complaining of the direction for payment of the whole sum; and insisting, that it should be confined to one third; the Petitioners being entitled to the other two thirds.

Mr. Richards, Mr. Fonblanche, and Mr. Hall, for the Defendants, in support of the Petition for Re-hearing.—Upon the construction \* of the Will of John Stephens the Plaintiff [\* 65] must contend, that the testator, using these very large words, intended to die intestate as to this part of his property. With words so comprehensive there can be no intestacy, except by subsequent accident. If the testator had withdrawn this sum from the subject of his disposition, that would be intelligible: but he had not so withdrawn it: on the contrary he directs, that it shall be laid out to answer the trust. The Will has no exception: passing every thing, merely subject to the payment of his debts; declaring the intention, that this sum shall be disposed of for the uses described; and there is no appointment of any person to take in exclusion of those, entitled under these uses.

(a) See 1 Jarman, Wills, (Lond. ed. 1844,) 468-476.

(1) Reported, ante, vol. xii. 419.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Roupell*, for the Plaintiff, in support of the Decree.—Conceding for this purpose, that cross remainders cannot be implied, the question upon the construction of Stephens's Will is, whether the intention appears to dispose of all his property with the exception of this sum. Against an heir at law the devisees must show express words, or plain and necessary inference. The effect of the disposition, under the circumstances, in which the testator stood, is a direction, that this purchase shall be made for his heir at law. The subsequent devise is expressly subject to the performance of his agreement to pay this money; which is declared to be a charge on his real as well as personal estate. A direction to mortgage a devised estate may be accounted for by the special object: to purchase, for instance, a particular estate; to answer some purpose of convenience: but with such a reason, can any intention more absurd be conceived than to charge a devised estate for the

mere purpose of raising money, to purchase another estate, [\*66] to go to the \* same persons; and how is the omission to confine that charge to one third, the proportion to which Green, the only person interested with the devisees, was entitled, to be accounted for? The effect of the Will is precisely the same as a devise, with the exception of that sum, charged upon the property devised; the payment of which is imposed on the devisees as a debt; and it is not rational to suppose, that the debt, so imposed upon them, forms part of the property given to them, subject to that charge.

Upon the question of cross remainders, it was proposed, that a cause should be directed; if that question should arise by the judgment of the Lord Chancellor against the Plaintiff upon the construction of the Will of Stephens; but a few days after the argument his Lordship said, it might be necessary to have another question spoken to: whether the direction to lay out the personal estate in land should not be executed by raising cross remainders.

1809, Jan. 31. Sir *Samuel Romilly*, Mr. *Hart* and Mr. *Roupell*, for the Plaintiff.—Upon the implication of cross remainders there are several cases: *Hill v. Comber* (1). *Wright v. Holford* (2). *Pery v. White* (3). *Phipard v. Mansfield* (4). *Atherton v. Pye* (5). [\*67] *Watson v. Foxon* (6). *Stanton v. Peck* (7); \* and many others (8): but upon the question now under consideration, whether the Court will direct cross remainders in tail between these nieces to be inserted in the settlement, there is very little au-

(1) 2 Stra. 969.

(2) Cowp. 31.

(3) Cowp. 777.

(4) Cowp. 797.

(5) 4 Term Rep. 710.

(6) 2 East, 36.

(7) At the Rolls, 22d May, 1788.

(8) See the references in the notes, ante, vol. xii. 425; iii. 541.

thority to be found. A Court of Equity, executing the direction of a testator, or the agreement of parties to marriage articles, by decreeing a formal settlement, consider, not the legal effect of the words, but the intention, if manifest; and with that view will give the limitation a form, varying materially from the terms, used in the Will or articles. Accordingly in a variety of cases marriage articles, giving an estate to the husband for his life, with remainder to the heirs of his body, have been executed by a limitation to the husband for life, with remainders to the first and other sons in the course of a formal settlement. So a Court of Equity, executing a direction to settle leasehold estate in the same manner as freehold, prevents the consequence, that the first tenant in tail would immediately on his birth acquire the absolute property by supplying what is not expressed in the articles (1).

A third class of cases, regulated by this principle, is the execution of a direction to convey to different members of a family and the heirs of their bodies, with remainder over for want of such issue, by inserting cross remainders. This is very fully stated by Lord Hardwicke in *Marryat v. Townly* (2): the case of a Will; and by Lord Camden in *Twisden v. Lock* (3), upon marriage articles. Another case is *The Duke of Richmond v. Lord Cadogan* (4), before Lord Bathurst. Upon \* the marriage of the Duke of [\* 68] Richmond with a daughter of Lord Cadogan a recognizance in a Statute Staple was executed to lay out 60,000*l.* in land; to be settled upon all the children, except an eldest son, equally to be divided among them share and share alike, as tenants in common, and not as joint tenants, and the several and respective heirs of their respective bodies issuing, and, for want of such issue, to the use of the eldest son; and upon the death of one of the younger children the question, whether that share should go to the others, or to the eldest son, was determined in favor of the implication of cross remainders.

These authorities establish this doctrine; prevailing equally in the cases of marriage articles and a Will: but in the latter instance the intention must be apparent on the Will; and the rule stated by Lord Mansfield (5) in *Pery v. White*, is, that the presumption is in favor of cross remainders between two; but among more than two against them: that presumption however liable to be answered by circumstances of plain and manifest intention. The Court has in no instance rejected the implication under circumstances such as this case presents; and has in several admitted it upon very slight circumstances: in *Atherton v. Pye* (6) and *Stanton v. Peck* from the word "all" inferring an intention, that the whole estate should go

(1) See *The Countess of Lincoln v. The Duke of Newcastle*, ante, vol. xii. 218.

(2) 1 Ves. 102.

(3) Amb. 663.

(4) In Chancery, 4th May, 1773.

(5) Cowp. 780.

(6) 4 Term Rep. 710.

over together ; which could not be without the implication of cross remainders ; and in *Watson v. Foxon* (1) a devise over of "the said premises" was held to be equivalent. In another case (2) Lord Mansfield lays stress upon the word "*remainder*" being in the singular number. The conclusion is, that in the course of [\* 69] the \*last century the Judges have anxiously looked for expression, that would enable them to get out of the rule against the implication of cross-remainders among more than two. The Court will be pressed with Lord Hardwicke's decision in *Davenport v. Oldis* (3), and the distinction upon the words "several and respective :" but Lord Kenyon did not approve that decision ; holding in *Watson v. Foxon* (4), that the word "respective" will not prevent the implication ; and can the word "several" have more effect ? Lord Bathurst in the case of *The Duke of Richmond v. Lord Cadogan* says, that Lord Mansfield's note of *Davenport v. Oldis* has the word "heirs ;" instead of "issue," according to Atkyns's Report.

In this Will the limitation over is on failure of issue of the nieces to the testator's right heirs ; and, though no case appears to have been decided upon that circumstance, there is no instance, that with such a limitation the intention for cross-remainders between more than two has not been inferred. That construction is just and rational ; as without those words each third would go to the heir upon failure of issue of each devisee ; and upon that supposition the words are altogether useless ; but, if the intention was, that no part of the estate should go over until failure of issue of all, then those words have their use ; and the sound rule is, that, if by one construction words must be useless, which by another will have operation, the latter shall prevail. The intention, that this estate should not vest under the limitation over in parcels, appears at least as strong as from the word "all" in *Atherton v. Pye* (5), and the other expressions, noticed in *Watson v. Foxon* (6).

[\* 70] \* Mr. Richards, Mr. Fonblanque, and Mr. Hall, for the Defendants.—The rule of Law is perfectly settled ; that cross-remainders are implied between two ; and may be raised among more upon the manifest intention, collected from the Will : but, unless that intention can be collected, this Court must follow the rule of Law ; which is against the implication among more than two. The cases, referred to, of marriage articles, stand on the peculiar and distinct ground of contract. The wife and children are considered as purchasers ; and the Court, following the ordinary course of such transactions, upon that consideration takes a greater latitude than when merely executing the trusts of the Will (7). In the one

(1) 2 East, 36.

(2) Doe, on the Demise of *Burden v. Burville*, 2 East, 47, note.

(3) 1 Atk. 579.

(4) 2 East, 36.

(5) 4 Term Rep. 710.

(6) 2 East, 36.

(7) See the opinion of Lord Eldon, (*ante*, vol. xii. 227, *The Countess of Lincoln*

case the intention must manifestly appear: in the other it is implied from the nature of the transaction and the presumed object. The articles are considered merely as heads of the proposed settlement; and, to secure that object, to prevent the consequences of a literal execution, provisions are introduced, expressions varied, and defects supplied. The case of *Austin v. Taylor* (1), determined upon this distinction, is a sound authority, never impeached. Here is nothing to authorise the insertion of cross-remainders among the daughters of John Stephens. They are to take as tenants in common, which direction alone is sufficient to disjoin their estates, without the addition "to their several and respective heirs." Can this Court, directing a conveyance, unite interests, which the devisor has thus anxiously disjoined? Upon what ground of authority or policy can estates so devised to be enjoyed \* in severalty, be brought [\* 71] together: and the devise over on failure of issue of each individual be suspended, until the whole can go over in a mass? The words "several and respective" can have no influence, except to show the intention; as Mr. Booth observes in the *Collectanea Juridica*: nor is the devise over for want of such issue sufficient alone. All the authorities, from *Holmes v. Meynel* (2), prove the contrary; that the devise over must be so conceived as to show the intention, that it should take effect as to the whole estate; as in *Stanton v. Peck* (3), *Atherton v. Pye* (4), and *Watson v. Foxon* (5). In this Will the intention, that the devisees shall take jointly, and the advantage of survivorship, are anxiously excluded. What inference arises from the limitation to his own right heirs; the mere expression of that, which would have been implied by law? The conclusion is, that in the sound construction of this Will, considered as an immediate devise, cross remainders are not to be raised among these three nieces, contrary to the rule of law; not being necessary for any purpose of convenience; and no inference of that intention to be collected from the Will.

Sir Samuel Romilly, in reply.—The rule as to favoring cross remainders between two only, and discountenancing them among mere objects, cannot have application here; as the number of daughters, whom John Stephens might have, must be uncertain; and the testator must be supposed to have the same meaning in both devises. There is no substantial difference. \* Clearly [\* 72] intending, that the limitation over shall not take effect until a failure of issue of all the daughters of Stephens, he must also be conceived to mean, that the estate shall not go over until a failure of issue of all the nieces. The limitation, as far as the daughters

v. *The Duke of Newcastle*,) that there is no distinction in the execution of an executory trust by Will and a covenant in marriage articles.

(1) Amb. 376.

(2) Sir T. Raym. 452; Sir T. Jones, 172; Pol. 425; Skin. 17.

(3) At the Rolls, 22d May, 1788.

(4) 4 Term Rep. 710.

(5) 2 East, 36.

are concerned, is almost in the terms of *Wright v. Holford* (1); and it must be shown, that in the latter part of the Will he used the same words in a different sense. This is a mere question of construction; and the cases have turned upon the slightest circumstances, and distinctions merely verbal, introduced by *Holmes v. Meynel* (2). What is given to these nieces? The estates, before devised: that is, these premises: the whole, or all, of these premises. What sound distinction can depend upon the introduction or omission of such words? The true principle of construction is, that effect is to be given to every word, if possible: therefore words, which in one sense are inoperative, but in another will have operation and effect, shall be taken in the latter sense. If cross remainders were contemplated, the words of the ultimate limitation are useful and necessary: otherwise, they have no effect; being merely the expression of what the law had already done. In *Wright v. Holford* the certificate, which in that case was for the first time made openly in Court, states the ultimate limitation to the heir at law as one of the reasons; the Court considering it as a strong circumstance in favor of cross remainders.

There is no distinction between executory, or, as they are sometimes called, imperfect, trusts, created by marriage articles [\* 73] and by will (3). The true distinction is \* between trusts executed and executory, by either instrument: the latter being executed by the Court according to the intention; in the one case collected from the contract of the parties: in the other from the disposition, made by the owner of the property. Where there is an immediate devise, as in the case of a trust, declared by deed, the Court must not conjecture as to the intention; but takes it as expressed upon the instrument: but, where a settlement is directed, the devisor knows, that another act is to be done; that it is sufficient therefore to state his general object; that words must be inserted, and in many instances estates given to different persons, not mentioned in the original instrument; as under the common direction for a settlement upon the first and other sons in tail, a trust to preserve contingent remainders must be interposed.

There is nothing inconsistent in giving the same words in the same Will a different effect with reference to the different nature of the property; as in *Forth v. Chapman* (4): a sound authority, notwithstanding the attempts to impeach it. It is certainly very technical: but the Court must take it to have been in his view, as the established law, that these words shall have a different effect according to the different nature of the property; as if freehold and leasehold estates are given by Will to the same person, without more, the intention must be taken to be, according to the legal effect of that disposition, that the devisee shall have an estate for life in the freehold estate,

(1) Cowp. 31.

(2) Sir T. Raym. 452; Sir T. Jones, 172; Pol. 425; Skin. 17.

(3) *The Countess of Lincoln v. The Duke of Newcastle*, ante, vol. xii. 218.

(4) 1 P. Will. 663. See *Porter v. Bradley*, 3 Term Rep. 143.

and the absolute property of the leasehold. The case of *Papillon v. Voice* (1), a direct decision upon this point, is not to be distinguished in principle; is confirmed by *Austen v. Taylor* (2); and has ever since \* stood as the law of this Court. Here is [\* 74] an express direction to settle the estates to be purchased; which the Court must regard, not as a devise of real estate, but as a direction, that with regard to the estates to be purchased such limitations as are pointed out shall be made: a purpose, which he probably intended to execute in a formal way.

The Lord CHANCELLOR [ELDON].—This case is under very peculiar circumstances. The doctrine as to the implication of cross remainders has been much agitated in Westminster Hall during the last thirty years; and I have been always strongly impressed with the extreme difficulty of applying the established presumptions, supposed to belong to that class of cases, to a devise, not to individuals named, an ascertained number, who are to take first as tenants in common, with remainder over, but to the future daughters of a person, then having none: with reference to which limitation it could not occur to the testator with any certainty, whether any individuals, one, two, or more, would exist, and become entitled under it; and therefore upon the death of one the proportion to go over could not be ascertained; as that must depend upon the number, that might come into existence. The limitation to the daughters of John Stephens “and to her and their heirs” clearly shows his conception, that there might be only one: but it is difficult to conceive an actual intention, that, when one daughter should be born, the entirety should vest in her. The intention, that upon the birth of another she should take a share, is very probable: but that was with a view to her advantage; and he never could mean that object in favor of the second to operate against the first for the sake of the second: still less, that it should have that effect against the interest of the first in an event, in which the second would have no benefit; \* and [\* 75] that, though she died immediately after her birth, a moiety of the estate should be taken from the first, and be transmitted to the nieces. One of the best grounds of the judgment in *Wright v. Hollford* (3) appeared to me to be this. The devisor, limiting the estate to all and every the daughter and daughters, and the heirs of their body and bodies, could not intend, that upon the birth of a daughter the use of the entirety should vest in her: that upon the birth of another daughter the estate should open, was clearly the intention: but that it should open, not only to let her in, but to exclude the elder daughter, if the second died without issue, is utterly incomprehensible. The reasoning in some of these cases upon the expression “all the premises,” &c. is not satisfactory. There is a considerable distinction between the limitations in this Will to the daughters of Stephens and to the testator’s nieces: the instant a

(1) 1 P. Will. 471.

(2) Amb. 376.

(3) Cowp. 31.

daughter of Stephens was born, she would have had the entire estate ; liable to be reduced to a share only by subsequent events : but the testator's nieces would take shares originally : in the one case there would be a reduction, in the other an accumulation, of interest by some subsequent event.

Another difficulty as to the actual meaning of this testator is this. Could the intention be, that, if after the death of Stephens without issue one of the nieces had died, each of the two survivors should have a third as devisee in tail ; and that they should take the remaining third as co-heiresses at law ? Attending to the distinction upon the implication of cross remainders between estates in common, created originally among individuals named, and the case, where, one having the whole originally, the intention to devest must be supposed, if the manifest intention can be collected, [\* 76] that the words, "for want of such issue" \* shall have this effect, that manifest intention shall be executed. The case of *Papillon v. Voice* (1) has gone this length at least ; that, whatever distinctions have been taken between marriage articles and a Will, upon the object of articles, and the general course of dealing in the execution of that object, the Court looks at such instrument, and the nature of it, collecting the intention, perhaps under different circumstances : but in the instance of a legal devise by a Will, containing also an executory trust to settle lands, to be purchased, to the same uses in substance, the Court in the execution of that trust regards the actual intention, if it is to be collected, in a much greater degree than in the construction of the legal devise. In *Austen v. Taylor* (2) Lord Northington did not mean to shake that case : and admits the principle of the Court. At the same time I cannot understand, what he means, saying, there was to be no settlement there. Some conveyance there must be.

1810, June 2d. The Lord CHANCELLOR [ELDON].—This is a case of a species, which perhaps does not frequently occur ; in which the Court is driven to determine, whether in the limitation to the daughter and daughters of John Stephens and to her and their heirs for ever as tenants in common cross remainders are to be implied ; as the word "respective" is not found in that limitation ; and yet, that word, occurring in the very next devise, is to have all the effect of preventing the implication of cross remainders among the nieces. It was contended, first, that by the true construction of the Will of

Stephens this sum of 9453*l.* 2*s.* 10*d.* is not to be considered as a subject of intended bequest or devise ; \* and, as real estate therefore the Plaintiff in his character of heir at law is entitled to it ; and farther, that under the Will of Philips the nieces are to be considered as tenants in common in tail with cross-remainders ; and the Plaintiff, being the son of the survivor, is entitled to an estate tail in the whole.

(1) 1 P. Will. 471.

(2) Amb. 376.

The declaration of the Decree, which is the subject of this Petition of re-hearing, does not appear to me to do justice to Lord Erskine's opinion ; which I collect from the argument, and the judgment, as they appear in the Report, to have been, that this sum of money was not intended to pass by the Will of Stephens. The declaration would therefore have been more correct, if it had stated, that under the Will of Philips, and in the events, that had happened, the Plaintiff is entitled : viz. to one third, as son of the surviving niece ; and to the other two thirds in another character. A great deal of probable and strong argument was urged in support of that opinion ; but I doubt, whether it is possible to withdraw this sum of money from the effect of Stephens's Will. It is land : it will pass by the words "messuages, lands, tenements and hereditaments ;" the heir at law would be entitled to the whole ; or to a proportion, if cross remainders were not implied : and, though it is very improbable, that the testator contemplated, that it would pass by his Will, yet it is very difficult to take it out of that constructive intention, which has in many cases been collected from such words.

For this reason I thought it right to consider the other question : whether the Will of Philips created cross remainders among these parties. If cross remainders are created, the effect will be the same ; that the Plaintiff will be tenant in tail of the whole. With regard to that question, though it seems to me absolutely impossible \* to reconcile the cases of cross remainders in the books, [\* 78] and feeling, as I formerly have felt, upon the case of *Phipard v. Mansfield* (1), great difficulty to maintain the distinction upon the word "respective," I am compelled in this case to decide, whether that word does, or does not, make the distinction : a point, which the Court of Common Pleas found themselves obliged to consider in the late case of *Doe*, on the demise of *Gorges v. Webb* (2) ; where it was argued upon the introduction of the word "respectively," that the estate of each would go over to the ulterior remainder-man ; and, if the argument upon that word, as making the distinction, could be applied as effectually, as it had been, where there was nothing but a limitation to two, or more, and the heirs of their bodies respectively, *a fortiori*, upon a Will, the former part of which had limitations to several persons and the heirs of their bodies, without the addition of that word, the conclusion must be, that the testator in the latter limitation inserting that word, must have had some different meaning. It is unnecessary to go through the various cases upon cross-remainders ; which were all cited, and very well reasoned upon, by my Brother Williams. It is sufficient to state, that the Court, particularly Mr. Justice Lawrence, denied, that any distinction is now to be considered as resting upon that word "respectively ;" stating, that the cases, which have founded themselves on the distinction of that expression must now be considered as hav-

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(1) Cwyp. 797.

(2) 1 Taunt. 234.

ing been overruled : Lord Kenyon and Lord Mansfield both dissenting from the case of Lord Hardwicke. The Court of Common Pleas laid some stress on the circumstance, that in the last limitation the testator gives "the same;" and this sort of criticism is used ; that "*the same*" must be all, that had been given to the preceding takers ; and therefore within those authorities, where cross [\* 79] \* remainders were implied from the word "all" in the limitation over ; as raising the inference, that the whole estate was to go together ; which could not be without cross remainders. It is going a considerable way to raise this inference merely from the use of the word "all;" as *all* is given together in a different event : and, as to the expression "*the same*," there is no subject of gift, except that mentioned in the preceding part of the Will.

Conceiving the intention of this Will to be for cross remainders among the daughters of the nephew, I cannot think, that the testator had not the same intention with regard to his nieces. There is nothing to distinguish them except the word "*respective*;" which upon the authority I have last mentioned does not make a distinction upon which judicial construction should turn.

The conclusion is, that the Plaintiff, if he is not entitled, as Lord Erskine conceived him to be, would have taken the whole estate, as tenant in tail by the implication of cross remainders among his mother and aunts ; and is in that view entitled to this money, considered as land. It is not necessary therefore to vary the decree farther than by directing an Inquiry, before payment of the money, whether he has in any manner incumbered it.

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*Six, ante,* the notes to S. C., 12 V. 419

## WHEATE v. HALL.

[ROLLS.—1809, DEC. 19.]

PURCHASER not compelled to take a doubtful title (a): namely, by executing a Power of Sale, introduced under a direction by a Decree, establishing a Will, to the Master to approve a proper settlement; the Will not authorizing the insertion of such a power: nor could it be sustained under a power by a former settlement; which, if not extinct by the failure of the limitations, and the union of the estate for life with the reversion, could not be duly applied to purposes clearly foreign to its original object: and though purchasers are not put to exercise a very nice and critical judgment with regard to the purposes, for which powers are created, it could never be intended to refer to a perfectly new set of limitations, in a new settlement, at a long subsequent period, under a disposition by the Will of the owner of the fee: to be exercised, not for any purpose in the least degree connected with the settlement, but avowedly as an expedient to supply the want of a valid power in that settlement; and enable those, whom he had made only tenants for life, to dispose of the estate.

THE Bill prayed a specific performance of an agreement by the Defendant for the purchase of an estate in the county of Oxford, called Cokethorpe Park; and the usual Decree having been made for a reference upon the title, the Master reported, that the Plaintiffs could make a good title; to which report an exception was taken by the Defendant.

The Objection arose out of the following instruments. By indentures of lease and release, dated the 22d and 23d of April, 1793, previous to the marriage of Maximilian Western the younger, and Maria Loder, Maximilian Western the elder, and Maximilian Western the younger, conveyed to trustees and their heirs the manor and estate of Cokethorpe, to hold to them and their heirs (subject to a jointure of 800*l. per annum* for Elizabeth, the wife of Maximilian Western the elder, and a charge of 8000*l.* for the portions of their younger children, under the settlement, executed on their marriage in 1776), to the use of trustees for a term [\* 81] of ninety-nine years: remainder to the use of Maximilian Western the elder, for life: remainder to trustees to preserve contingent remainders: remainder to Maximilian Western the younger, for life: remainder to trustees to preserve contingent remainders: remainder to the intent, that Maria Western should receive a jointure of 400*l. per annum*: remainder to trustees for five hundred years; remainder to the first and other sons of the marriage in tail male: remainder to the use of the survivor of Maximilian Western the elder, and Maximilian Western the younger, in fee.

(a) See, for a collection of cases in which Courts of Equity have compelled a purchaser, upon their own opinion, to accept a title depending upon questions of great nicety, 2 Sugden, Vend. & Purch. (6th Am. ed.) 121, [180], *et seq.*

But, that Courts of Equity will not compel a purchaser to take a doubtful title, see 2 Sugden, Vend. & P. (6th Am. ed.) 110, [166]; *ante*, note (a) Cooper v. Denne, 1 V. 565; note (a) Rose v. Calland, 5 V. 189.

Still, that mere possibilities, or mere suspicion ending in suspicion, ought not to be regarded, see 2 Sugden, V. & P. 123, [183]; Ten Broeck v. Livingston, 1 Johns. Ch. 357.

The trusts of the term of ninety-nine years were to raise 600*l.* per annum for Maximilian Western the younger, during the joint lives of him and his father; and, in case the father and Maria Western should both survive Maximilian Western the younger, to raise after his decease 400*l.* a-year for Maria Western during the joint lives of her and Maximilian Western the elder; to be, with the other 400*l.* a-year, provided for her, in lieu of all dower; and the trust of the term of 500 years was for better securing to her the 400*l.* a-year in case of her surviving her husband.

The settlement contained a power for the trustees and the survivor and his heirs, &c. at any time during the joint lives of Maximilian Western the elder, and Maximilian Western the younger, and Maria Western, or of the survivors, or during the life of the survivor of them, by and with the consent, direction and appointment, of the said persons, or the survivor, in writing, &c. to make sale and dispose of or to convey in exchange for other estates in fee-simple in England, all or any part of the premises, thereby released: and it was provided, that the money should be laid out in the [\*82] purchase \* of other estates; and that the estates so purchased, or taken in exchange, should be settled to the same uses, or as near thereto as the deaths of parties and other contingencies would then admit; and that the money, until so invested in purchases, should with the consent of Maximilian Western the elder, and younger, and Maria Western, or the survivor, if they or any of them should be then living, or, if they should be dead, by the authority of the trustees, be placed out in Government or real securities: the interest to be paid to such persons, and for such uses, &c. as the rents, if the purchases were made.

Maximilian Western the younger, died in the life of his father without issue; leaving Maria Western his widow; who afterwards married Robert Simmonds.

Maximilian Western the elder, by his Will, dated the 3d of January, 1799, devised to Sir Martin Browne Folkes and Charles Calles Western the estate of Cokethorpe, with other estates and property; reciting, that the whole was conveyed to trustees under the marriage settlement of himself and his son, subject to the jointures of 800*l.* and 400*l.* per annum for their respective widows, in trust, after the payment of 5000*l.* between his two daughters, or to the survivor of them, in addition to the 8000*l.*, before mentioned, to secure the same to his two daughters and the survivor of them for life; then to their respective first and other sons in tail; then to their respective daughters in tail, with cross remainders: if no issue, then to his two sisters for life, and their sons and daughters in tail: if no issue, then to his nephew Seymour Larpent, for life, and his first and other sons in tail, and his daughters, with cross-remainders in tail, taking the

[\*83] name of Western: if no issue, the remainder to Charles Calles Western and his \*heirs for ever; and he gave all the residue of his fortune real and personal to his daughters, share and share alike, subject to his debts and any payments he

might direct by his Will ; and he appointed his wife and two daughters his executrices.

The testator died on the 7th of January, 1801 ; leaving Elizabeth, his widow ; who is since dead, and the Plaintiffs Elizabeth Wheate and Frances Strickland his only children. By a Decree, pronounced in 1804 on farther directions, in a cause, instituted for the purpose of having the Will established, and the trusts carried into execution, it was declared, that the Cokethorpe estate was to be limited and settled, subject to the two jointures of 800*l.* and 400*l.*, and raising the sum of 8000*l.*, and to the terms for securing the same, to the use of trustees for a term of years ; upon trust by mortgage or sale to raise the said sum of 5000*l.* ; and, subject thereto, to the several uses, declared and directed by the testator's Will concerning the same ; and it was referred to the Master to approve of a proper settlement accordingly.

A settlement was accordingly executed, bearing date the 1st and 2d of May, 1805 ; by which the real estates were conveyed to a trustee and his heirs, subject to the prior charges by the marriage settlements, to the use of Sir Martin Browne Folkes and Charles Calles Western, their executors, &c. for the term of 2000 years ; and subject to that term, to the use of the daughters and their issue in moieties, &c. ; according to the limitations, prescribed by the Will ; and it was declared, that it should be lawful to Folkes and Western and the survivor at any time or times by the direction of Mrs. Strickland during her life, and after her decease of the persons under the limitations entitled to the actual freehold of the moiety, limited to her, to sell or exchange the said moiety of all or any part of the said \* estates ; and for that purpose to [\* 84] revoke the uses, and declare new uses ; with various directions for effectuating the sale or exchange ; and to lay out the money in the purchase of other estates, with the same consent to be settled to the same uses, &c. and in the mean time to invest the money in Government or real securities ; and pay the dividends and interest to the persons, who would be entitled to the rents of the estates, to be purchased. The trust of the term of 2000 years was to raise the sum of 5000*l.* by sale, mortgage, or other disposition ; to be applied according to a former order ; and to pay the surplus rents to the persons, entitled under the limitations, &c.

The Exception to the Report in favor of the title, having been argued by Mr. Richards and Mr. Shadwell, for the Plaintiffs, and by Sir Samuel Romilly, Mr. Leach and Mr. Bowdler, for the Defendant, stood for judgment.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The question, submitted by the Exception to the Master's Report, is whether a good title can be made to the estate, either under the power, contained in the settlement of May 1805, or under that in the settlement of April 1793. In one or the other of those ways, it is admitted, the title must be made ; or it cannot be made at all. To the title under the power in the deed of 1805 the objection is that the

insertion of such a power is not authorized by the Will, upon which that settlement is grounded. In a cause; depending here, a reference was directed, among other things, to the Master to approve a proper conveyance for settling the estate in question to the several uses, declared, or directed, by the Will of Maximilian Western the elder. That Will gives no power of sale to the trustees: [\* 85] but in the \* conveyance, approved by the Master, such a power is inserted ; and it is alleged, that the circumstance, that the power was to be, or had been, inserted, was in some way brought under the notice of the Court ; which either approved, or did not disapprove, the insertion. My opinion however is, that, whether that be, or be not, correct, is entirely out of the case ; as the fact does not appear in any shape, of which the purchaser can avail himself for the protection of his title. All that appears upon the face of the proceeding, is, that there was a reference to the Master to approve a proper conveyance to the uses of the Will. All, that the Master in such a case reports, is, that he has approved a proper conveyance ; without stating, what the conveyance is. Unless some exception is taken to the draft, the Court has no opportunity of judicially deciding, whether any particular clause should be introduced. There could therefore be no judicial decision, that this power was properly introduced into the settlement. It is difficult to say, it was authorized by the Will ; unless it is to be implied, and therefore ought to be inserted, in every executory trust ; the Will being entirely silent upon the subject. No great stress perhaps can be laid upon the direction to secure the estate to the successive devisees, as indicating an intention to exclude a power of sale : but in the absence of any expression, from which the intention to include such power can be inferred, I am not aware, that it was ever decided, that the introduction of such a power under such circumstances is of course : nor have I learnt that it is the practice to insert a power of sale in executing such a trust ; where the Will is entirely silent (1). I therefore cannot think, a purchaser ought to be compelled to take a title, depending upon the validity of such a power (2).

It is then contended, that the power, depending upon the settlement of 1793, still exists : and therefore by the execution [\* 86] \* of that power an unexceptionable title may now be made.

The objection to the title, as under that power, is, that, supposing the power legally remains unexerted, which however was questioned in the argument, yet there cannot now be a good execution of it in equity ; as all the purposes, for which the power was created, have ceased to exist. I think, it would be attended with ill consequences to put purchasers upon exercising a very nice and critical judgment with regard to the purposes, for which powers have been created : at the same time I cannot conceive, that a Court

(1) *Brewster v. Angell*, 1 Jac. & Walk. 625.

(2) *Cooper v. Denne*, 4 Bro. C. C. 80; *ante*, vol. i. 565 ; and the note, 567.

of Equity will sanction the application of a power to purposes, clearly and obviously foreign to those, for which it could have been originally intended. It is clear, this power of sale in the settlement of 1793 was introduced with reference to those limitations, which would have made a sale impracticable, if a power, over-reaching those limitations, had not been introduced: but, when by the failure of all the intermediate limitations the estate for life of Maximilian Western the elder, became united with his reversion in fee, the power was no longer necessary to enable him to dispose of his interest; and it could not be intended, that any disposition he might make should be liable to be superseded by the exercise of the power. In *Mortlock v. Buller* (1) the Lord Chancellor seems to have thought, that the power in such a case would be legally extinct: but, however that may be, it could never be intended to refer to a perfectly new set of limitations, in a new settlement, at a long subsequent period, under a disposition of the estate, made by the Will of the owner of the fee. It is not alleged, that the power is now even colorably to be exercised for any purpose, in the least degree connected with the settlement: not even for raising any charge, to which the estate was subject by that settlement, \* or of facilitating [\*\_87] the disposition of the estate by any party: but it is avowedly to be resorted to merely as an expedient to supply the want of a valid power in the settlement in 1805; and to enable those, whom the owner of the fee has made only tenants for life, to dispose of the estate. That I think an undue exercise of the power; and consequently a purchaser is not to be compelled to take a title, depending upon it.

The Exception therefore must be allowed.

1. THE mere intention of a testator to secure an estate to successive devisees can neither authorize a court to introduce, by implication, any provision which the testator has not indicated, nor to exclude any power which he appears to have intended to entrust to the first takers: see, *ante*, the notes to *Stanley v. Stanley*, 16 V. 491. And if, in articles of agreement before marriage, and preparatory to a formal settlement, there be a clause providing that such settlement shall contain all usual powers, a power of sale or exchange, by the concurrence of the trustees and of the tenant for life, ought to be inserted; for such a power, so to be exercised, is a usual and proper power: *Peak v. Penlington*, 2 Ves. & Beat. 311; *Brewster v. Angell*, 1 Jack. & Walk. 628. But, under such general words, whether contained in a will or marriage articles, to give the tenant for life a power of sale or exchange without check or control, would be giving him what is not a proper power, nor is it a proper power to be given, under such a direction, exclusively to trustees; of course, however, the case would be different if it could be clearly collected, that the intention was to give a separate and substantive power of sale, either to the trustees or the tenant for life, or to one or the other, as the contingent events should or should not happen: *Horne v. Barton*, Jacob's Rep. 440. But, if the intention be in any degree doubtful, it would be impossible to compel a purchaser to accept a title depending on the execution of such power: *Brewster v. Angell*, 1 Jac. & Walk. 629. Articles for a settlement to contain a power of leasing for twenty-one years, and all other usual powers, do not authorize the introduction of a power to grant building-leases for longer terms; the altered circumstances of the property may make such a power very desirable, and

(1) *Ante*, vol. x. 292; see 315.

beneficial to all parties, but the contract cannot, on those grounds, be reformed; the general words in the articles will be of no effect, as opposed to the particular mention of a specific number of years, for which there was to be a power of granting leases: *Pearse v. Baron*, Jacob's Rep. 158.

2. A power given to trustees must be exercised only in furtherance of the purposes for which it was created: see note 2 to *M'Queen v. Farquhar*, 11 V. 467.

3. As to the necessity of a reference to the Master before an order is made under the statute of 39 & 40 Geo. III, c. 56, see the note to *Binford v. Bauden*, V. 512.

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## BECKFORD AND OTHERS v. WADE.

(IN THE PRIVY COUNCIL.)

[WHITEHALL, 1805, APRIL 29.]

EFFECT of the Statute of Limitations, or possessory Law, of Jamaica, (beyond the Statutes of Limitations in this Country;) barring not merely the legal remedy, but any suit, claim, or demand: converting seven years' possession into a positive, absolute, title (a).

No exception in favor of absentees; not being within the exception expressed; as there was no such exception out of the Statutes of Limitation in this Country; until expressly given by Stat. 4 Ann. c. 16, s. 19.

The exception in the Law of Jamaica relating to Trustees, means actual, not constructive, trusts.

The Exception as to tenants for life not applicable, where they could convey the fee under a power of Sale.

Exception out of Common Law Bars or Forfeitures, by Fine, final Judgment in a Writ of Right, Descent after Disseisin, Copyhold Heir not coming to be admitted upon the Proclamations, in favor of Infancy, non-sane Memory, or Absence beyond Sea, [p. 89.]

General words in a Statute must receive a general construction; unless there is in the Statute itself some ground for restraining their meaning by reasonable construction, not by arbitrary addition or retrenchment (b), [p. 91.]

Where the words of a Law in their ordinary signification are sufficient to include infants, the virtual exception must be drawn from the intention of the Legislature, manifested by other parts of the Law, from the general purpose and design of the law, and the subject-matter of it, [p. 92.]

Thus the Statutes of Limitation and of Fines would have bound infants, &c. without an express exception, [p. 92.]

(a) There are States, like Jamaica, which have declared, that all right to debts, due more than a prescribed term of years, shall be deemed extinguished; and that all titles to real and personal property not pursued within the prescribed time, shall be deemed for ever fixed in the adverse possessor. Story, *Confl. of Laws*, § 582; *Lincoln v. Battelle*, 6 Wend. 475. A statute of this sort, extinguishing the title to real estate after an adverse possession, and transferring the title to the adverse possessor, actually exists in the State of Rhode Island. Act of 1822, Digest of R. I. Laws, p. 363, 364, ed. 1822.

Suppose personal property is adversely held in a State for a period beyond that prescribed by the laws of that State, and after that period has elapsed the possessor should remove into another State, which has a longer period of prescription, or is without any prescription; the question arises, whether the original owner could assert a title there against the possessor, whose title by the local law, and the lapse of time, had become final before the removal? According to the present case, and other authorities, the title of the possessor cannot be impugned. See *Neuby v. Blakeley*, 3 Hen. & M. 57; *Brent v. Chapman*, 5 Cranch, 358; *Shelby v. Grey*, 11 Wheat. 361, 371, 372.

Another question is, whether the bar of a statute extinguishment of a debt, *lege loci*, ought not to be held a peremptory exception in every other country? This question may be deemed by some persons open to future discussion; but the affirmative has been declared by high authority. *Shelby v. Grey*, 11 Wheat. 361, 371, 372; *Huber v. Steiner*, 2 Bing. N. Cases, 202, 211; *Don v. Lippman*, 5 Clark & Finnell. 1, 16, 17; 3 Burge, Comm. on Col. and For. Law, pt. 2, ch. 10, § 5, p. 883, 884. See *De Couche v. Sivetier*, 3 Johns. Ch. 190, 218; *Van Reimsdyk v. Kane*, 1 Gall. 371; *Le Roy v. Crowninshield*, 2 Mason, 151, and the cases there cited.

(b) For the rules of the interpretation of statutes, see 1 Kent, Com. (5th ed.) 460-466.

Though the Courts of Justice were shut up in time of war, so that no Original could be sued out, the Statute of Limitation continues to run (*a*), [p. 93.] Effect of length of time in Equity by analogy to the Statutes of Limitation; though not directly affecting trusts (*b*), [p. 96.]

Though no time bars a direct trust, as between *cestui que* trust and trustee, a constructive trust barred by long acquiescence; though the true state of the fact may be easily ascertained, and the ground of original relief was clear; and even arising out of fraud (*c*), [p. 97.]

Redemption barred by twenty years' possession without impediment to the mortgagor, or ten years after impediment removed (*d*), [p. 99.]

THE MASTER OF THE ROLLS [Sir WILLIAM GRANT] pronounced the following judgment:—

As we are of opinion, that the Decree in this case must be reversed, it may be proper, as shortly as possible, to state the grounds upon which that opinion is founded.

[\* 88] \* We conceive, that the title of the Appellants is established, and the claim of the Respondent barred by the Statute of Limitations, or possessory Law, of the Island of Jamaica, of the 4th Geo. II. It is therefore unnecessary to enter into the original merits of the case farther than to say, we are not completely satisfied, that even upon the merits the Decree is warranted by the evidence before the Court. If the case had come recently before us, we should have been disposed to direct several inquiries, before we had proceeded either to affirm or reverse the Decree.

This possessory Law is framed upon a different principle from our Statutes of Limitation. It is rather of the nature of the *Usucapio* of the Roman law, or the positive prescription of the law of Scotland. It does not bar the legal remedies, if the parties do not proceed within a certain time: but it converts a possession for seven years, under a Deed, Will, or other conveyance, into a positive, absolute ti-

(*a*) When the statute has begun to run, no subsequent disability affects it. Chitty, Contr. (5th Am. ed.) 814; *Rhodes v. Smethurst*, 4 M. & W. 42, in which all the cases were elaborately reviewed; *Ruff v. Bull*, 7 Har. & J. 14.

(*b*) See, *ante*, note (*a*) *Jones v. Turberville*, 2 V. 13; 2 Story, Eq. Jur. § 1520; note (*d*) *Stackhouse v. Barnston*, 10 V. 453; note (*b*) *Acherley v. Roe*, 5 V. 565.

(*c*) In case of a direct trust, no length of time bars the claim between the trustee and *cestui que* trust. *Cook v. Williams*, 1 Green. Ch. 209; *Weddeburn v. Weddeburn*, 2 Keen, 749; *Baker v. Whiting*, 3 Sumner, 476; *Armstrong v. Campbell*, 3 Yerger, 201; *Overstreet v. Bates*, 1 J. J. Marsh. 370; *Pugh v. Belb*, ib. 401; *Coster v. Murray*, 5 Johns. Ch. 224; *Gist v. Cattel*, 2 Desaus. 53; *Thomas v. White*, 3 Litt. 177; *Stephen v. Yandle*, 3 Hayw. 221; *Trecotthick v. Austin*, 4 Mason, 16; *Tussey v. Massy*, 4 Yerger, 104; *Benzien v. Lenoir*, 1 Con. Law Repos. 508; *Wisner v. Barnet*, 4 Wash. C. C. 631; *Bryant v. Packett*, 3 Hayw. 252; *Fisher v. Tucker*, 1 McCord, Ch. 169; *De Couche v. Savetier*, 3 Johns. Ch. 216; *Shelby v. Shelby*, Cook, 182; *Wambuzee v. Kennedy*, 4 Desaus. 474; *Pinson v. Ivey*, 1 Yerger, 297; *Turner v. Debell*, 2 A. K. Marsh. 384; *Von Rhyn v. Vincent*, 1 McCord, Ch. 314; *Ivy v. Rogers*, Dev. Eq. 58; *Robinson v. Hook*, 4 Mason, 150; *Bigelow v. Bigelow*, 6 Ham. 97; *Hemenswoy v. Gates*, 5 Pick. 522; *Kane v. Bloodgood*, 7 Johns. Ch. 90.

Where there is a trust by implication it must be pursued within a reasonable time. *Edwards v. University*, 1 Dev. & Bat. Eq. 325; *Ex parte Hassell*, 3 Y. & Coll. 617. See *Townshend v. Townshend*, 1 Bro. C. C. 554, (Am. ed. 1844), and notes.

(*d*) See, *ante*, note (*b*) *Hillary v. Waller*, 12 V. 239.

tle, against all the world. From the very nature of the provision it must be equally binding upon a Court of Equity as upon a Court of Law; as what the Statute declares to be a good title must in either Court be equally held to be so; and it is provided, that after such possession the party "shall be at liberty to give this Act in evidence, or plead the same in bar," not, as our Statute says, "of certain legal remedies," but in bar "in any suit or suits, claim or demand, to be brought or made against him, her, or them, by his Majesty or his successors, or any other person whatsoever; the right or title of any prior patentee, or any other act, law, custom, or usage, to the contrary hereof notwithstanding."

It appears, that the Appellants, and those, under whom they claim, have had a possession of more than \* fifty years, [\* 89] under deeds, wills, and other conveyances, before this suit was instituted; and that more than seven years, that is, upwards of nineteen years, of that time elapsed, after the right of the Respondent had accrued. It is not attempted to be shown, that the facts of alleged fraud, upon which the Respondent now grounds her claim, came first to her knowledge within seven years before the commencement of the suit. It is therefore unnecessary to examine, how far she could in such a case have insisted upon an equitable exception in her favor out of the operation of this law. Almost all the evidence, that is in any way material, is furnished from the records of the Courts of Justice and the Register Office of the Island; and it appears, that these had been examined by a person, employed on behalf of the Respondent's devisor; and that the result had been communicated to the Respondent herself upwards of twenty years before the institution of this suit.

There is however one exception, which, though not contained in the Act, it is said, must, on a principle of inherent equity, be constructively introduced into it; that is, an exception in favor of persons out of the Island of Jamaica; in which situation the Respondent was at the time, when her title accrued; and I believe, has at all times been. I do not know, that she ever was in the Island of Jamaica. It is said, that our Statutes of Limitation are held to contain such virtual exception in favor of persons beyond seas; where it happens not to be positively expressed.

I have not been able to find any authority whatever for this doctrine. Lord Coke, in the passage referred to in his comment upon Littleton, chapter "Of \*Continual Claim (1)," [\* 90] and in *Sir Richard Lechford's Case* (2) is not speaking of the construction of Statutes; or contending, that there is any virtual exception out of the general words of any Statute: he is speaking of bars and forfeitures at common law; of bar by the common law fine; by a final judgment upon a writ of right; a descent after a dissesion; a forfeiture (which was *Sir Richard Lechford's Case*) of the

(1) Co. Litt. 262, a.

(2) 8 Co. 90.

copyhold heir by not coming in to be admitted upon the proclamations. In none of those cases is an infant, a person of non-sane memory, or a person beyond seas, affected by the bar, or the forfeiture: but then the modification is coeval with the rule; and forms a part of it: the rule never existed, except as accompanied with its exception: both stand upon the same common law authority: but are we therefore to introduce into a Statute, conceived in general terms, all the exceptions, which upon principles of common law we may think it reasonable that the Statute should have contained; and in particular can we do so in a case, such as the present; where the Statute does notice some of the common law disabilities, does adopt some of the common law exceptions, but omits others? Is this choice and selection, made by the Legislature, to be controlled, and in effect annulled, by a supposed inherent equity; which is to prevent them from so legislating; as in reality it would come to a question of competency? If the Legislature have deliberately made this distinction (and there is nothing to show it was not deliberately made), how can we refuse to give effect to it, without denying, that it was competent to the Legislature so to distinguish the case of absentees from that of infants, *feme covert*, and persons of non-sane memory? I have no doubt, the omission was intentional. It is evident, that absence from Jamaica contained no real disability to sue there; and so many proprietors are at all times absent from the Island, that the purpose of the Act would have been in a great degree frustrated, if the claims of such absent proprietors could at any time be made without any limitation or restriction.

[\* 91] The proposition, that this construction, under the doctrine of inherent equity, is put upon our English Statutes of Limitation, is, as I apprehend, altogether unfounded. General words in a Statute must receive a general construction; unless you can find in the Statute itself some ground for limiting and restraining their meaning by reasonable construction, and not by arbitrary addition or retrenchment. I can easily refer to many cases, in which such a construction ought to take place. One instance is furnished by the first Statute of Wills, the 32 Hen. VIII. which declares, that all and every person or persons may devise their lands by Will: although no explanatory Statute had ever passed, I should have thought there would have been no difficulty whatever in holding, that this Statute could not have enabled infants and persons of non-sane memory to devise by Will: the obvious intention of the Statute being to make a Will a competent mode of conveying land, it could not be meant to make those capable of conveying by Will, who were not capable of conveying in any other way. It was, however, thought proper, though I think it was not necessary, to introduce those exceptions by an explanatory Statute of the 24th Henry VIII. That shows very strongly the opinion of the Legislature, that general words in a Statute might, even in such a case as that, have had a general operation, if this explanation had not afterwards been given.

The true rule on this subject is laid down by Sir Eardly Wilmot in his opinion in the House of Lords on the case of *Lord Buckinghamshire v. Drury* (1): He says, "Many cases have been put, where the law implies an exception; and takes infants out of general words by what is called a virtual exception. I have looked through all the cases; and the only rule to be drawn from them is, that, where the words of a law in their common and ordinary signification are sufficient to include infants, the virtual exception must be drawn from the intention of the Legislature, manifested by other parts of the law, from the general purpose and design of the law, and from the subject-matter of it." And he mentions the Statute of Limitations, as an instance of a case, in which infants would be barred, if it were not for the introduction of the saving clause. Accordingly we find, that in the great case of *Stovel v. Lord Zouche* (2), upon the Statute of Fines of Henry the Seventh, where the question was, whether, when the bar by five years' non-claim had begun to run in the time of the ancestor of full age, it should continue to run against his infant heir, although there was a great difference of opinion among the Judges upon that question, the whole argument turns upon the true construction of the Statute itself, with reference to all the parts of it, and to the object it had in view, and not upon any supposed inherent equity, by which infants were to be excepted out of the operation of the Statutes of Limitation. On the contrary, it is laid down in that case (3), and laid down without any contradiction: "For as much as they intended," that is, the Legislature intended, "to avoid universal trouble (as the preamble speaks) and to make peace, which is to be preferred before all other things, and for as much as they have made the provision general, viz. that the fine shall be final, and \*shall [\* 93] conclude as well privies as strangers: if the Act had stopped there, it would have bound as well infants, *femmes covert*, and the others, named in the exception, as people of full age, and who were void of such defects."

I may also advert to the case of Defendants, absent, or out of the realm, before the Statute of Queen Anne (4). It was in vain attempted upon general reasoning in many cases to introduce an exception in favor of the Plaintiff in a case, where the Defendant was out of the realm; a most reasonable exception undoubtedly to be made, but which the Statute had not made. A Plaintiff out of the realm may prosecute a suit by his attorney; but when the Defendant is out of the realm, it is very hard to call upon the Plaintiff to institute a suit, which in most cases must be wholly without fruit; yet, until the Statute of Queen Anne was made, that case formed no exception, and the Statute of Limitation barred the action.

A very strong case is put: that of the Courts of Justice being shut

(1) Wilm. 177; see 194.

(2) Plowd. 353.

(3) Plowd. 369.

(4) Statute 4 Ann. c. 16, s. 19.

up in time of war; so that no original could be sued out; and yet it has been given as the opinion of learned Judges, that even in that case the Statute would continue to run. In the case of *Hall v. Wybourn* (1), and *Aubry v. Fortescue* (2), it is stated to have been held by Bridgman, Chief Justice, that though the Courts of Justice were shut up, so as no original could be filed, yet this Statute would bar the action; because the Statute is general; and must work upon all cases, which are not exempted by the exception; and in 10th Modern this resolution is said to have been often approved by  
 [\* 94] \* Lord Chief Justice Holt. Here is a Statute: which contains no exception whatever in favor of absentees; we are therefore of opinion, that it is impossible by construction to introduce that exception into the law.

Then does the case fall within any of the express exceptions in the Act? In the first part of the Act the letter of the provision went much beyond what could be the real intention of the Legislature; as mortgagees, trustees, tenants for life, lessees, possessing for seven years, would by the mere letter have acquired a title; and therefore it is provided, that the Act shall not be held to extend to a possession, held by such persons, or any claiming under them.

The Respondent says, that this case falls within two of these exceptions: first, that with regard to tenants for life; and, secondly, that with regard to trustees. As to the first, it is said, that Mrs. Roe, and Mrs. Trehee (by whom, that, which is alleged to be the only effectual conveyance, was made in the year 1744) were tenants for life; and therefore no possession under a title, derived from them, can operate as a bar under this Statute. It is true, they were tenants for life; but they had likewise a power, under Edward Roe's Will, of selling for the payment of his debts; and by virtue of such power they made a conveyance of the fee-simple. If there were any legal defects in that title, it was not to a Court of Equity that the Respondent ought to have resorted; but, such as the title was, it cannot be the better or the worse, either in a Court of Law or a Court of Equity, from the circumstance, that they, who had the power, and who either fairly or fraudulently exercised it, had also in them the estate for life. It would be a strange thing to say, that, if they had nothing but the power, the validity of the title, derived under it, could not now be \*inquired into; but that a title, identically the same as it would in that case have been, shall remain for ever liable to be questioned, merely as the vendors had in them something over and above the power, namely, a life estate. We conceive, that there is no ground whatever for holding this Exception to be applicable to the present case.

The other Exception, within which the case is said to fall, is that relating to trustees. On that head the respondent thus states her case; and for the purpose of trying, whether the Statute of Limita-

(1) 2 Salk. 420.

(2) 10 Mod. 206.

tion applies to it we must take the case to be, as she states it. She says, that the conveyances, under which the Appellants claim, were the result of a fraudulent combination between the several parties to them, and not made in the fair and necessary execution of the testator's Will; that consequently the parties, taking under those conveyances, and all, who claim by virtue of them, or by title deduced from them, are in the contemplation of a Court of Equity to be considered as trustees for those, who are injured by the fraud; and who would be owners of the estate, if the fraud had not been committed.

The question then is, what the true construction of the Act is in this particular: whether it meant only actual and express trusts, as between *Cestui que trusts* and trustees properly so called, upon which length of time ought to have no effect: or whether it intended to leave open to perpetual litigation every equitable question, relative to real property. If it did so intend, it was ill calculated for obtaining its professed purpose of quieting possessions, and of preventing many vexatious and expensive suits at Law and in Equity, of which the preamble complains. I hardly know how, according to this construction, any suit in Equity would be barred by this Act. Upon [\* 96] what grounds is a Court of Equity ever called upon to direct one man to convey a real estate to another, except upon the ground of a trust, either actual or constructive? When the Act speaks of one man being seised or possessed to the use of, or in trust for, another, I can hardly conceive, that it means any other than an actual direct trust; not such possible, eventual, trust, as may, in case certain facts are established in evidence, be declared by a Court of Equity against a person, who claims to be, and who *prima facie* is, the true owner of the estate. Questions of that kind almost always depend upon controverted facts; and, according to every principle, upon which Statutes of Limitation are grounded, long possession ought to secure a party against the necessity of entering into such a controversy at a distance of time.

In the present case, for instance, supposing no limitation applies to it, the question, that is to be made, and discussed, is, what personal estate a man left, who died in the year 1735, and what debts he owed, for the purpose of ascertaining, whether it was necessary to sell any part of his real estate for the payment of his debts? The possession during the whole of that time has been completely, openly, and avowedly, adverse, until a title and claim of absolute property, appearing upon the Records of the Island: but, in order to support the construction, contended for by the Respondent, reference is made to the laws of this Country; where, it is said, without any express exception of trust, the general doctrine is against applying statutory limitations to cases of trust. As our Statute bars only legal remedies, of course it has no direct operation upon trusts; for which there was no remedy but in Courts of Equity. But Courts of Equity by their own rules, independently of any Statutes of Limitation, [\* 97] give great effect to length of time; and they refer frequently to the Statutes of Limitation for no other purpose

than as furnishing a convenient measure for the length of time, that ought to operate as a bar in Equity of any particular demand (1).

It is certainly true, that no time bars a direct trust, as between *cestui que trust* and trustee : but, if it is meant to be asserted, that a Court of Equity allows a man to make out a case of constructive trust at any distance of time, after the facts and circumstances happened, out of which it arises, I am not aware, that there is any ground for a doctrine, so fatal to the security of property as that would be ; so far from it, that not only in circumstances, where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear, that relief would originally have been given upon the ground of constructive trust, it is refused to the party, who after long acquiescence comes into a Court of Equity to seek that relief.

In proof of this it is not necessary to produce any other case than that of *Bonny v. Ridgard* (2) ; in which Lord Kenyon, when Master of the Rolls, on the sole ground of length of time reversed a Decree, by which Sir Thomas Sewell had granted relief against a fraudulent purchase, and had declared the purchaser to be a trustee for the Plaintiffs in the cause ; Lord Kenyon agreeing perfectly, that the purchase was originally fraudulent ; and that the Defendant must have been held to be a trustee, if the suit had been brought in proper time.

[\* 98] There is no full report of that case in print ; though it is cited \* in some other cases ; but I have a very accurate note of it, taken by Mr. Cox. It was a case, where a testator had left leasehold property, with a direction to his executrix to sell it for the benefit of his children. His wife, who was his executrix, soon after his death, married Ridgard, one of the Defendants. He and she together mortgaged these infants' estate, in the first instance, I believe, for a *bona fide* consideration ; they afterwards sold the Equity of Redemption to the Defendant Barnard. The consideration for that purchase was, not money paid (except a small sum of six pounds), but a debt due to Barnard from the husband of the executrix. This was in the year 1752. The youngest of the children, who, if this estate had not been improperly sold, would have been entitled to the produce of it, came of age in 1764. When the Bill was filed is not stated ; but Sir Thomas Sewell's Decree was made in 1783. He was of opinion, that it was a case of gross fraud and collusion between the executrix and the vendee of the estate ; merely a trick, by which the estate was played into the hands of the purchaser in payment of a debt of his own ; and upon that ground he declared, Barnard the purchaser was to be considered as a trustee for the children, and to account to them for the rents and profits. The case came before Lord Kenyon upon a petition of re-hearing. After stating the facts Lord Kenyon states the principles : he con-

(1) See the note, *ante*, vol. ii. 15, *Jones v. Turberville*.

(2) Cited 4 Bro. C. C. 138.

sidered this as a clear fraud in the purchaser ; and concludes that part of the case by saying, " All this satisfies me, that the money was not raised for fair legal purposes ; the fund in the hands of the widow was applicable to the payment of debts, &c. and after that to certain purposes, declared by the Will. Barnard, the purchaser, had full notice of the Will ; he knew, that, after the debts were paid, this fund ought to be so applied ; and he was instrumental in its being misapplied : and, had the case turned \* upon [\* 99] this, I should be bound to set aside the transaction, or rather to turn the Defendants into trustees for the Plaintiffs : but there is another point upon which I must decide the cause ; which is the length of time, that has elapsed between the Plaintiff's right accruing, and their prosecuting that right. The testator died in 1748 ; the sale took place in 1752 ; the youngest child came of age in 1764 ; and though I admit the Statute of Limitations does not affect trusts, yet this Court from a principle of convenience has borrowed an analogy from that Statute. The common case is that of a mortgage. When a mortgagee has been in possession twenty years (1) without any impediment in the mortgagor to assert his title, or, if such impediment has been removed for ten years, it shall be a bar to the redemption : so in this case I think the length of time ought to bar ; and, if the authorities did not say so, I would make the precedent. Here are many persons, through whose hands this property has passed, who have relied on the undisturbed possession ; and have laid out considerable sums of money in the improvement of it. Upon that ground it would be too much at this distance of time to give the Plaintiffs the relief required. If these persons had made their claim, when they came of age, it would be different ; but upon the whole I think it right to say, that the length of time is a bar in this case."

In the case of *Andrew v. Wrigley* (2) Lord Alvanley recognised the doctrine of this case, and acted upon it : and in the case of *Townsend v. Townsend* (3) Lord Commissioner Ashhurst lays down the distinction between actual trusts and trusts by implication. He says, " As to \* trusts being an exception to the [\* 100] Statutes of Limitation, the rule holds only as between trustee and *cestui que trust* ; it is true, that a trustee cannot set it up against his *cestui que trust* ; but this case being merely that of a trustee by implication, and as such affected by an equity, that equity must be pursued within some reasonable time."

When a Court of Equity, bound by no Statute of Limitation, would apply a limitation to such a case as the present, would it be reasonable to say, that a Law, professing to bind Courts of Equity, had intended to save and preserve this case out of the operation of its own provisions ; provisions anxiously made for the purpose of qui-

(1) *Reeks v. Postlethwaite*, Coop. 161; *post*, *Barron v. Martin*, vol. xix. 327; Coop. 189.

(2) 4 Bro. C. C. 125.

(3) 1 Bro. C. C. 550; *see* 554.

eting possession, and of excluding questions, relative to intricate and litigated facts, that might be raised at a distance of time after possession had taken place. The letter of the Act of Assembly of the Island of Jamaica is perfectly answered by holding the exception to apply to trusts in their proper and ordinary signification; that is, express trusts, as between *cestuis que trust* and their trustees. Nothing could be more repugnant to its object than to hold that exception to be applicable to such a constructive trust as the Respondent has attempted to make out by the evidence in this cause.

This disposes of the whole case. The Act, according to our construction of it, does completely establish the title of the Appellant, and does bar the claim, made by the Respondent. The consequence, therefore, is, that the Decree must be reversed *in toto*; and the Bill must be dismissed.

1. ALL titles to lands in our West Indian colonies are regularly to be decided upon, in the first instance, by the courts of local judicature, from whose decision an appeal lies to his Majesty in council: *Attorney-General v. Stewart*, 2 Meriv. 156. Incidentally, however, it may be necessary for the Court of Chancery here to decide such questions: see, *ante*, notes 4, 5, to *Lord Cranston v. Johnston*, 3 V. 170.

2. When a person, apparently clothed with the legal power of disposition, has sold property, though there may be circumstances exciting a suspicion that the purchaser had notice the vendor was executing his power fraudulently, still, after long possession under such purchase, a court of equity would not be disposed to relieve: *Andrew v. Wrigley*, 4 Brown, 135. Even in cases where there is no statutable bar, equity always discountenances stale demands; and, where the common law remedy is barred by statute, an analogous limitation is usually adopted by courts of equity: see notes 2, 3, to *Jones v. Turberville*, 2 V. 11; note 2 to *Edeall v. Buchanan*, 2 V. 83; note 4 to *Whichcote v. Lawrence*, 3 V. 740; note 3 to *Hillary v. Waller*, 12 V. 239; and notes 3, 4, to *Lord Shipbrook v. Lord Hinchingbrooke*, 13 V. 387.

## PEARSON v. LANE.

[ROLLS.—1809, Dec. 15, 19.]

**CONVEYANCE** to Trustees, in trust to sell, and purchase other estates, to be settled. Those, entitled under the limitations directed of the estates to be purchased, have equitable interests co-extensive until a Sale. Therefore a specific performance was decreed of an agreement for partition against an objection to a title under a fine by a person, who would have been tenant in tail of the estates to be purchased, the effect being an election to keep the estate; binding the Trustees; though it may be questionable, whether they could take upon themselves to convey in fee to a person, entitled to an estate tail only.

Money, given to be laid out in land, to be conveyed, or land to be sold, and the produce paid, to A. though in the one case the money is not given to him, and in the other no interest expressly in the land, he is in Equity the owner; and may elect to have the money, or the land conveyed, as he shall direct (a), [p. 104.]

By Indentures of lease and release, dated the 10th and 11th of April, 1764, William Jesson conveyed to trustees and their heirs one undivided moiety of freehold estates; to hold upon the trusts and for the purposes after mentioned: that is to say; in trust that they, the said trustees, &c. should with all convenient speed sell and dispose of the said undivided moiety, and pay and apply the money, arising by such sale or sales, and by the rents and profits until sale, upon and for the trusts and purposes following: first, to pay a bond debt of 2037l. 12s.; and farther out of the surplus to retain 1500l. for the younger children of William Jesson; and upon farther trust, as soon as convenient, to lay out the residue of the money, arising by such sale, and by the rents and profits until sale, in the purchase of other messuages, lands and hereditaments in fee-simple in possession, either freehold or copyhold, to be settled and conveyed to the uses and upon the trusts after mentioned: viz. to the use of trustees for fifty years, if William Jesson shall so long live, in trust to raise 55l. per annum for the maintenance and education of his eldest son by Hannah, his wife; and, subject thereto to the use of William Jesson and his assigns for life: remainder to trustees to preserve contingent remainders: remainder to the first and other sons of William Jesson by Hannah his wife, in tail general; remainder to the use of all and every their daughters equally and the heirs of the bodies of such daughters, as tenants in common in tail \* general, with benefit of survivorship: [\* 102] remainder to the use of William Jesson, his heirs and assigns for ever; with a covenant to surrender copyhold estates to the same uses. William Jesson died in 1788; leaving two daughters, his only issue: Hannah Freeman Pearson and Elizabeth Pudsey Lynch. No sale was ever made of Jesson's moiety of those estates, pursuant to the trusts of the settlement.

By indentures, dated the 23d of July, 1788, William Pearson and

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(a) As to the doctrine of Equitable Conversion, see, *ante*, note (a) 5 V. 397; notes (a) and (b) *Walker v. Denne*, 2 V. 170.

Thomas Groesback Lynch, the husbands of the daughters of Jesson, covenanted to levy a fine surconuzance, &c. of Jesson's undivided moiety of the estate: to enure, as to one equal moiety of the said undivided moiety, to the use of the trustees and their heirs; upon trust that they should with all convenient speed convey, settle and assure, the same unto and upon the several uses, trusts, &c. declared by the marriage settlement of William Pearson; and as to the other moiety, in the same manner to the uses of the marriage settlement of Lynch. Fines were levied accordingly. William Pearson died; leaving his wife surviving and William Jesson Pearson his only child. Thomas Groesback Lynch died without issue.

The Defendant being entitled to the other undivided moiety of the estates, by articles, dated the 8th of June, 1808, an agreement was entered into for a partition between the Plaintiffs on the one part and the Defendant on the other.

The Bill filed by William Jesson Pearson, and the widow of Lynch, claiming under the respective marriage settlements of the daughters of William Jesson, prayed a specific performance of that agreement, stating the objection, taken by the Defendant; and that the [\* 103] equitable \* intail, created by the deed of 1764, was not well barred by the fines levied: and the said estates being vested in trustees, in trust to sell, and to lay out the money in other lands, to be settled to uses, under which the parties entitled would have been tenants in tail, with reversion to themselves in fee, the fines were levied of lands, in which the intail did not subsist: the Plaintiffs insisting, that they were entitled as co-heirs in tail, with reversion to themselves under deed of 1764; and therefore the trustees in that deed might have conveyed to them discharged of the trusts; and that the Plaintiffs, being such tenants in tail and reversioners, had power of election to take the said estates under the deed of 1764 in lieu of the lands, directed to be purchased; and the fines operated as an election on their parts, respectively, to take the undivided moieties of the estates under the deed of 1764, in lieu of the lands, directed to be purchased; and the fines having barred the intail, the Plaintiffs under the circumstances acquired the beneficial interest in fee-simple; and can make a good title.

The Defendant by his answer submitted, that the fines levied by the Plaintiffs, did not bar their interests; as they had no estates tail in the lands, which were the subject of the fines; but were to be tenants in tail of the lands, to be purchased.

This case stood for judgment. Mr. Richards and Mr. Benyon, for the Plaintiffs, cited *Benson v. Benson* (1). *Short v. Wood* (2). *Trafford v. Boehm* (3), and *Lord Gwydir v. Campbell* (4).

[\* 104] \* 1809. Dec. 19th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—From the nature of the objection to

(1) 1 P. Will. 131. See the note, *ante*, vol. i. 512.

(2) 1 P. Will. 470.

(3) 3 Atk. 440.

(4) Stated in the judgment.

this title it is necessary to determine, whether the daughters of William Jesson took an interest in the estate, conveyed by the trust-deed ; and, if they took any, what that interest was. It is clear, if the trust had been executed, if the estate had been sold, and another estate purchased with the money, they would have been tenants in tail, with the immediate remainder or reversion to themselves in fee of such estate. It is true, in the estate to be sold, they had no interest legal or equitable, expressly limited to them : but the equitable interest in that estate must have resided somewhere : the trustees themselves could not be the beneficial owners ; and if they were mere trustees, there must have been some *Cestui que trust*. In order to ascertain, who they are, in such a case a Court of Equity inquires, for whose benefit the trust was created ; and determines, that those, who are the objects of the trust, have the interest in the thing, which is the subject of it ; and therefore, where money is given to be laid out in land, which is to be conveyed to A., though there is no gift of the money to him, yet in equity it is his ; and he may elect not to have it laid out : so, on the other hand, where land is given upon a trust to sell, and to pay the produce to A., though no interest in the land is expressly given to him, in equity he is the owner ; and the trustee must convey, as he shall direct. If there are also other purposes, for which it is to be sold, still, he is entitled to the surplus of the price, as the equitable owner subject to those purposes ; and, if he provides for them, he may keep the estates unsold. There cannot in reason be any difference, whether the benefit to arise from the sale is given in one shape or another ; \*that of [\* 105] the money, to be produced by the sale ; or of other land, to be purchased with that money.

If any authority is wanting for this, the case of *Lord Gwydir v. Campbell*, cited by Mr. Benyon, will furnish one. That was the case of copyhold estate, to be sold, and freehold, to be purchased and settled, so that Lord Gwydir would be tenant in tail, with remainder to himself in fee : he was considered the equitable owner of the copyhold : and the legal estate was directed to be surrendered.

Upon these principles the daughters of William Jesson had in this trust estate an equitable interest, of the same extent with that, which they would have had in the purchased estate, if a purchase had been made, subject to the charge in favor of their father's creditors. That charge is admitted to be satisfied ; and it seems to me quite immaterial, at what time it was satisfied. The interest they would have had in the purchased estate, if a purchase had been made, would have been, as I have already said, in the event, that has happened, viz. their father's death without issue male, an estate tail with the immediate remainder to themselves in fee. A fine was levied by them ; therefore, there being no remainders over, and issue being barred by the fine, they acquired the equitable fee. The argument, that the fine can have no effect upon this estate, as no interest in it was limited to them, is merely controverting what I have stated as the doctrine of the Court ; and denying, that they had any

interest in the trust estate. If they had any interest, it must have been an estate tail ; which must be capable of being barred. Suppose, no fine had been levied, there would then have been ground to contend, that the trustees would have been compelled to convey to them in fee ; as they might have taken the money absolutely, instead of \* having it laid out. It may be questionable, whether the trustees might themselves act upon this equitable doctrine ; and take upon themselves to convey in fee to a person, entitled to an estate tail only. That was the case of *Trafford v. Boehm* (1) : but here the fine excludes all questions of that sort. From that moment the trustees, not only might, but must, have conveyed the fee. The daughters electing to keep this estate, they acquired the fee ; and it was discharged of every trust, to which it had been subject. An unexceptionable title can therefore be made (2).

SEE, ante, the note to *Bisford v. Basden*, 2 V. 38, as to the right of persons who would be entitled to estates tail in lands directed to be purchased, under a will or settlement, to elect whether the money shall be so invested ; see, also, the notes to *Rashleigh v. Master*, 1 V. 201.

### CLARKE v. LORD ABINGDON.

[ROLLS.—1810, MARCH 5, 6.]

INTEREST beyond the penalty of a bond upon a mortgage for the same debt ; though by a Surety (a).

THE Master's Report stated, that by indentures of lease and release, dated the 17th and 18th of February, 1775, Lord Abingdon conveyed estates to Palmer and Powell ; upon trust to sell ; and out of the produce of the sale, after paying certain debts, to pay the sum of 12,000*l.* due by Lord Abingdon to Peregrine Bertie, with interest ; and to purchase 8000*l.* 3 per cent. Bank Annuities, also due to him, and 281*l.* 14*s.* annually, in lieu of dividends ; and to pay the residue of the money, produced by the sale, to Lord Abingdon.

The Report farther stated, that by a memorandum, dated the 18th of September, 1779, signed by Peregrine Bertie ; reciting various sums, borrowed by Lord Abingdon from Powell upon bond, viz. a bond, dated the 6th of December, 1777, for the payment of 2100*l.* [\* 107] with a \* penalty of 4200*l.* and another bond dated the 31st of July, 1778, for 525*l.* with a penalty of 1050*l.*, and farther reciting the indenture of 1775, Peregrine Bertie, acknowledging,

(1) 3 Atk. 440.

(2) *Bullock v. Fladgate*, 1 Ves. & Bea. 471.

(a) Interest is not given beyond the penalty of the bond, except under special circumstances. Note (a) *Mackworth v. Thomas*, 5 V. 331; notes (c) and (e) *Creuze v. Hunter*, 1 V. 157.

that in consideration of Powell's lending those several sums to Lord Abingdon he Peregrine Bertie promised to see Powell paid, therefore declared, that the said sums of 12,000*l.* and 8000*l.* stock, and the interest, secured to him, should be vested in Palmer and Powell, their executors, &c. upon trust to pay the said sums of 2100*l.* and 525*l.* due to Powell, and interest, and as to the residue for Peregrine Bertie.

The Report farther stated other bonds of Lord Abingdon and Peregrine Bertie jointly, the latter being a surety; and that by indentures, dated the 18th of February, 1783, between Peregrine Bertie and Clowes, reciting the deed of 1775, that Peregrine Bertie was indebted to several persons by bond, according to a list set forth, and that Clowes agreed to lend him the sum of 1500*l.* upon bond with 5 per cent. of even date with this deed (which sum was accordingly paid to him on that day) on his agreeing to secure that sum, and also the debts, contained in the list, Peregrine Bertie accordingly assigned the said sums of 12,000*l.* and 8000*l.* stock, and the interest, upon trust to discharge the several sums, due upon those bonds; with a covenant, that he had not incumbered except the sums of 2100*l.* and 525*l.*

An exception was taken to the Master's Report: viz. that, though it appeared by the Schedule to the Report, that the interest due on two bonds and other securities from Willoughby, late Earl of Abingdon, and the late Peregrine Bertie to the Defendants Radcliffe and Clowes, personal representatives of George Powell, for payment of the principal sums of 2100*l.* and 1500*l.* calculated to the date of the Report, considerably exceeded the \*amount of [\* 108] the penalties, yet the Master had not allowed any greater sum than the penalties of such bonds; whereas he ought to have allowed interest to the date of the Report.

Mr. Hart and Mr. Ainge, in support of the Exception, contended, that this case was not within the general rule against carrying interest beyond the penalty of a bond; the creditor having a distinct collateral security, by the assignment of 1779 of a charge on land, in the nature of a mortgage; his right under which to recover all the interest due cannot be prejudiced by the bond.

Mr. Richards and Mr. Edwards, Mr. Leach and Mr. Raithby, Sir Samuel Romilly and Mr. Heald, for different parties, sustaining the Master's Report.

The general rule, that interest shall not go beyond the penalty, is now clearly established by *White v. Sealy* (1), *Tew v. Lord Winterton* (2), and other cases (3); and the Master has properly adhered to that rule: the bond being the principal and primary security: the deed of assignment merely secondary and collateral: the former therefore determining the nature and extent of the contract and the

(1) *Doug.* 49.

(2) 3 Bro. C. C. 489; *ante*, vol. i. 451, and the note, 452.

(3) See, *ante*, *Mackworth v. Thomas*, vol. v. 329; *Clarke v. Seton*, vi. 411, and the notes.

remedy. The principle applies equally to debts, originally created by the joint bonds of Lord Abingdon and Peregrine Bertie, the latter as surety, and to bonds of Lord Abingdon alone, afterwards further collaterally secured by his brother; and the bond for 1500*l.*, though given on the same day as the date of the deed, falls within the same rule: being recited in the deed, the bond must [\* 109] \* be considered as previously executed. The deed being merely a subsequent, collateral, security for debts, previously constituted by bonds, not a new contract for payment of interest in any different mode, cannot enlarge the debt; or in any way affect the original rights.

*March 6th, 1810.* The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—In this case the creditor has two securities: one by bond; the other by mortgage. If he sues upon the former, he cannot have interest beyond the penalty: but the mortgage is to secure payment, not of the bond, but of the sum, for which the bond was given, together with all interest that may grow due thereon. The same sum therefore is differently secured by different instruments; by a penalty, and by a specific lien. The creditor may resort to either; and, if he resorts to the mortgage, the penalty is out of the question. The mortgage is not for that. The penalty is not alluded to or mentioned in the mortgage. If a creditor by mortgage afterwards took a bond, it is admitted, that he might recover upon the mortgage interest beyond the penalty of the bond; and there is no reason, why the effect should be different, if to-day a mortgage is made to secure a sum, for which a bond was given the day before. The distinction of Peregrine Bertie being a surety does not appear upon the latter instrument; and, besides, the obligation of a surety may be more extensive than that of the principal; as, if a mortgage is given by a surety to secure a debt by bond, the creditor may make the mortgage as available, as if it had been given by the principal debtor. I think, therefore, the Exception ought to be allowed.

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1. THAT, at law, interest upon a bond is never allowed beyond the penalty of the bond; and that, in most cases, though with some exceptions, the same rule is observed in equity when a bond is the single security: see, *ante* note 3 to *Ex parte Miles*, 2 V. 295. The reason why a court of equity will not (unless in the excepted cases before referred to) carry the debt beyond the penalty of a bond, when the obligee is plaintiff, is, because he has chosen his own security, and has made himself judge what recompense he shall have in case the debtor is in default, and he has no right to expect that his security should be enlarged or bettered for him; but, when he is defendant, the maxim, that he who seeks equity must do equity, may be urged against the obligor, coming as plaintiff: *Anonymous case*, 1 Salk. 154, and 1 Eq. Ca. Ab. 92. Upon this ground it has been determined, that, if lands are extended on a statute or judgment at much less than their real value, and the conveyor will come into equity, to make the conveyee account according to the real value, he shall not be relieved without paying the conveyee all that is due to him for principal, interest, and costs, though the amount may exceed the penalty of the recognisance: *Hale v. Thomas*, 1 Vern. 351.

2. It is only upon some collateral grounds that a surety can ever be called upon for more than the penalty of a bond: *While v. Sealy*, 1 Dougl. 49; *Wilde v. Clark-*

*son, 6 T. R. 304* : and, even against the principal obligor in a bond, conditioned for the purchase and settlement of lands, if the obligee has rested upon a penalty, he cannot have a collateral execution of the agreement by a decree for the lands : *Bagg v. Foster*, 1 Cha. Ca. 189.

## KINDER v. JONES (1).

[\* 110]

[1810. SEALS BEFORE EASTER TERM.]

INJUNCTION in trespass ; where the title was disputed (a).

THE Bill, filed by trustees, tenants, in fee-simple upon trust to sell, prayed an Injunction, to restrain the Defendant from cutting down trees, until the boundary of the estate could be ascertained at law.

Mr. Newland, for the Plaintiff, moved for an Injunction under the following circumstances, stated by affidavit.

The estate consisted of a mansion-house, park, and other grounds. In a lane, adjoining the park on one side and grounds, belonging to the estate on the other, were standing many timber trees alleged by the Plaintiffs to be extremely ornamental to the mansion-house and park, and which trees were alleged by the Plaintiffs to belong to them, the lane being a private lane ; and belonging to the estate. But the Defendant threatened to cut down those trees ; claiming to be entitled to them, as standing on part of the waste of a manor, of which he was the lord.

The Lord CHANCELLOR [ELDON] finding, on inquiry, that the Defendant had not been served with notice of this motion, said, that he must certainly be served with notice in such a case ; and expressed some doubt, whether the court had ever granted an Injunction in the case of trespass, where the title was disputed.

Notice of the motion having been accordingly served on the Defendant, the motion was renewed before the Master of the Rolls, sitting for the Lord Chancellor ; and, the Defendant not appearing, the Injunction was granted.

See the notes to *Price v. Williams*, 1 V. 401.

(1) *Ex Relatione.*

(a) See, ante, note (a) *Mitchell v. Dors*, 6 V. 147.

## HAYWARD v. DIMSDALE.

[1810, JUNE 9.]

EQUITABLE jurisdiction to order a deed, forming a cloud upon a title, to be delivered up, though void at Law (a).

Accordingly a demurser to a bill, to have a deed fraudulent and void, as in contemplation of bankruptcy, delivered up, was over-ruled.

THE Bill, filed by the assignees under a Commission of Bankruptcy against William Cole, dated the 15th of September, 1804, stated, that in August, 1804, the Defendant and George Hemmett Sturmy were under acceptances or indorsements for Cole ; who, being then insolvent, and desirous of giving an undue preference to them, executed a deed of covenant, dated the 3d of August, 1804 ; reciting, that he was seized to him and his heirs, according to the custom of the manor of Gold Hanger, of the hereditaments therein mentioned, and that he had prevailed upon Sturmy and Dimsdale to lend him the sum of 1500*l.* upon security of the same, which he had agreed to surrender to their use by way of mortgage, it was witnessed, that in pursuance of the said agreement, and in consideration of 1500*l.*, to the said William Cole paid by Sturmy and Dimsdale, Cole covenanted to surrender the paid copyhold premises to Sturmy and Dimsdale and their heirs ; accordingly subject to redemption on payment of 1500*l.*, with interest, &c.

The Bill charged, that this deed was executed by Cole in contemplation of his bankruptcy, and with the view of preventing an equal distribution among his creditors, and is therefore fraudulent and void as against the Plaintiffs, that the bankrupt himself first proposed to execute the deed, and at that time was embarrassed in his circumstances, and knew, that he must shortly become a bankrupt, that no such sum as 1500*l.* had been in fact advanced by Sturmy and the Defendant, but that they had accepted or indorsed bills and notes for the bankrupt, and it being uncertain, to what [\* 112] extent they might become \* liable thereby, and the pressure of the circumstances rendering it impossible to delay the execution of the security, it was agreed, that the sum of 1500*l.* should be inserted ; as being fully sufficient to answer the purpose of their indemnity ; that between the execution of the indenture and the act of bankruptcy a very short interval had elapsed ; and that the deed is in the possession of the Defendant.

The prayer of the Bill was, that it may be declared, that the deed was executed in contemplation of bankruptcy ; with the design of giving an undue preference ; and is therefore fraudulent and void as against the Plaintiffs : and that the Defendant and Sturmy are not entitled to set it up ; and that the Defendant may be decreed to give it up to be cancelled.

(a) Whether a Court of Equity will interfere to order a cancellation or delivery up of instruments, where the illegality appears on their face, so that their nullity can admit of no doubt, see, *ante*, note (a) *Bramley v. Holland*, 7 V. 22.

To this Bill the Defendant put in a general demurrer for want of equity.

Mr. Parker, in support of the demurrer: Mr. Wetherell, for the Plaintiff.

1810, June 9. The Lord CHANCELLOR [ELDON] declared his opinion, that there is a jurisdiction in this Court to order a deed, forming a cloud upon the title, to be delivered up; though that deed is void at law; observing, that both Lord Thurlow and Lord Loughborough had held the contrary (1).

The Demurrer was accordingly over-ruled.

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See note 1 to *Colman v. Sarrell*, 1 V. 50.

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### WELLS v. POWELL.

[\*113]

[1810, JUNE 9.]

**CONSTRUCTION of the General Order (23d January, 1794).**

Defendant, after Exceptions allowed, not having previously come under terms, is entitled of course to one Order for time: the General Order not attaching before the second application for time to answer an amended Bill, or after Exceptions allowed.

A motion was made by the Plaintiff, that an Order obtained by the Defendant, for six weeks' time to put in his farther answer on the ground, that he has had no Order for time, may be discharged; and that he may have a month from the 9th of May last, the date of that Order.

The Bill was filed in Trinity Term 1809 for an Injunction and Account. An appearance was entered as of that Term. In Michaelmas Term the Defendant obtained the usual Order in a country cause for six weeks' time to answer. Upon the expiration of that time he was taken under an attachment; and, being in contempt, he put in an Answer; to which exceptions were taken; and the Master by his Report, dated the 16th of April last, declared the Answer insufficient. The Defendant, being then called upon for a farther Answer, on the 9th of May again obtained the usual Order, as before, for six weeks.

Mr. Thomson, in support of the Motion, contended, that in no case after exceptions allowed is Defendant entitled to an Order for time; but he must come under the terms, imposed by Lord Ross-

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(1) *Colman v. Sarrel*, ante, vol. i. 50; 3 Bro. C. C. 12. See *Franco v. Bolton*, iii. 368, and the note, 371.

lyn's General Order (1) on a Defendant, making a third application for time ; citing *Partier v. De la Cour* (2).

The Lord CHANCELLOR [ELDON].—My opinion corresponds [\* 114] precisely with the rule as there stated. If the Defendant had come under terms in the first proceeding, that is, before exceptions allowed, or amendment, then he could not obtain a farther Order : but in this instance, as in another, very lately, exceptions were taken to the Answer, after one Order for time ; and the Defendant not having come under terms, the exceptions were allowed. The General Order does not hit that case. According to the old practice, which certainly required correction, upon amendment, or exceptions allowed, after a second or third Order for time, the Defendant began again ; taking the same time, as if no Answer had been put in. The effect of the General Order, as I understand it, is, with regard to that case, not to cut down the first Order, to which he was entitled under the old practice, but to attach upon the second Order. He is therefore to have six weeks again ; and is not to come under terms before the second Order ; which in the first instance was not required before the third ; but, if the Defendant has come under terms before the second Order, the Court holds him to those terms. The old rule went to this absurd extent : that the Defendant, having had three Orders for time, might put in an insufficient answer ; and after Exceptions allowed might again have three Orders. It is obvious, that, until he was got into that state, that he could be laid hold of, namely, after an insufficient Answer upon the third Order, he might baffle the Plaintiff. All, that was actually done by that Order, is, that, the Court by the rule, applying to the different cases, mentioned in the Order, puts the Defendant under terms, which he cannot get rid of : but the utmost extent of the rule is, that a defendant, demanding a third Order for time, is put under those terms ; and with regard to a new proceeding, after he has answered, he is put under the same terms upon a second application, which the first branch of the rule imposes upon the third.

Mr. Heald, for the Defendant, applying for the Costs, the Lord Chancellor gave them ; observing, that he had very lately made the same Order with Costs.

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See the note to the *Anonymous case*, 2 V. 270.

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(1) General Order, 23d January, 1794 ; 4 Bro. C. C. 544 ; Ord. Chan. edition by Mr. Beames, 455.

(2) *Anle*, vol. viii. 601. See also as to that General Order, (which arose from the case, vol. ii. 270,) *Gregor v. Lord Arundel*, *Plowden v. Lord Arundel*, vi. 144 ; viii. 87 ; *Spencer v. Bryan*, ix. 231.

KING, *Ex parte.*

[1810, JUNE 9.]

EQUITABLE right of partners, subject to the joint debts ; depending upon the result of the account between them (a).

Therefore under a joint Commission of Bankruptcy the separate estate of one has a lien on the other's share of a surplus of the joint estate in respect of a debt, proved under Bills, drawn in the name of the firm for a separate debt ; and may come in with the other separate creditors for the deficiency.

A JOINT Commission of Bankruptcy issued against Joseph King and his brother ; under which the amount of three Bills of Exchange, drawn by Joseph King, in the name of the firm, for his separate debt, had been proved.

The Petition, presented by the separate creditors of the other bankrupt, claimed a lien in respect of that proof upon Joseph's share of the surplus of the joint estate.

Mr. Cooke, in support of the Petition, contended, that the right of a partner is only to the result of an account between them respectively, after satisfaction of the joint debts (1) ; that this was determined in the case of a separate Commission against one partner ; and there \*can be no distinction, where there [\* 116] is a joint Commission, nor between the case of embezzlement, *Goss v. Dufresnoy* (2), and a charge thus improperly thrown upon the joint fund by one partner on his separate account.

Sir Samuel Romilly, for the separate creditors of Joseph King, observing, that, if separate Commissions had been taken out, the Assignees under each would have been tenants in common of the surplus, insisted, that there was no lien in respect of a debt from one partner to the other ; suggesting also an objection, that the proportion of capital had not been brought in according to the stipulation.

The Lord CHANCELLOR [ELDON].—I do not recollect any case, in which this lien has been established by decision : but I think, it ought to prevail ; and, if the surplus of the joint estate should not be sufficient to pay all that is due from one partner to the other, he ought to come in with the other separate creditors of the other. The surplus must be divided between them according to their equitable rights. The separate creditors of the one can have nothing, but what he could have ; and the separate estate of Joseph King consists of that part of the partnership effects, which shall remain, after the demands of his partner upon the partnership are satisfied. It does not follow, that the right of one partner in respect of these bills may not be met by other circumstances : as if he had not brought in

(a) See *ante*, note (b) *Hankey v. Garratt*, 1 V. 239 ; note (b) *Taylor v. Fields*, 4 V. 396.

(1) *Ante*, *Taylor v. Field*, vol. iv. 396; xv. 559, note ; *Hankey v. Garratt*, ii. 236, and the note, 239 ; see also 3 Bro. C. C. 457.

(2) *Davies*, 371 ; 1 Cooke's Bank. Law, 528 ; 8th edit. 522.

his proportion of capital, as is now suggested. I shall make the Order therefore ; unless some inquiry upon that head is desired.

[\*117] \* The Inquiry not being pressed, an Order was made accordingly.

1. This case is also reported in *1 Rose*, 212.

2. That, where a commission of bankrupt issues against one or more of several partners, the distribution of the joint property must be made with reference to the rights of the partners, as between themselves, and that the claims of the several classes of creditors are disposed of through the operation of administering the equities as between the partners, see, *ante*, note 3 to *Hankey v. Garrett*, 1 V. 236; and note 5 to *Lyster v. Dolland*, 1 V. 431.

### BANGLEY, *Ex parte.*

[1810, JUNE 14, 15.]

**BANKRUPT'S Certificate**, signed by the Commissioners, stayed by the Lord Chancellor under circumstances, appearing upon the examination ; particularly the inconsistency of the statement, that he had no written documents except a book produced, appearing to have been compiled from other written documents. Whether Bankrupt's Certificate can be sent back to the Commissioners, to be reviewed upon the point, whether a full discovery has been made, *Quere*. Duties of Commissioners of Bankruptcy, particularly with reference to the Certificate ; having also in a sense an independent judicial character, [p. 118].

THE Petition prayed, that the certificate of a bankrupt, which having been signed by the Commissioners, lay before the Lord Chancellor for his allowance, might be stayed ; alleging several circumstances, as evidence, that he had not made a full discovery : particularly payments, stated in his examination to persons, who could not be found ; and the production of a book, which he swore was the only book he had.

Mr. Hart, and Mr. Montague, in support of the Petition.

Sir Samuel Romilly and Mr. Wilson, for the bankrupt, observed upon the effect of too strictly requiring the production of regular books, and the severity of the bankrupt law of Ireland, making the certificate depend upon it ; considering the number of illiterate persons, engaged in trade : publicans, for instance, induced to trade by having a ready credit with a brewer.

[\*118] \* The Lord CHANCELLOR [ELDON].—By the bankrupt laws the Commissioners are charged with solemn and important duties ; and have also, I agree, in a sense, an independent judicial character operating sometimes to the prejudice, sometimes in favor of the bankrupt. The Statute (1), leaving to the creditors (2)

(1) Stat. 5 Geo. II. c. 30, s. 10.

(2) By Stat. 49 Geo. III. c. 121, s. 18, the proportion of creditors, for 20*l.* or

to determine for themselves, without any control, whether they will give their consent to the certificate, requires absolutely, that, before the person, holding the Great Seal, or those, to whom he may delegate that authority, can enter into any discussion upon the subject, the certificate of the Commissioners must be laid before him ; stating judicially under the sanction of their oath, that the bankrupt has made a full discovery of his estate and effects ; and in all things conformed himself according to the directions of the Act ; and that there does not appear to them any reason to doubt of the truth of such discovery ; or that it is a full discovery. In my own time applications have been made to parliament to renew the provisions of an Act, that formerly existed ; vesting in the Lord Chancellor the power to give the bankrupt his certificate ; where the creditors refused their consent : but upon great and repeated consideration the conclusion was, that such a discretion should not be entrusted to the Great Seal. The circumstances of this case demonstrate the infinite difficulty of coming to a conclusion, satisfactory to my own mind, and just towards the creditors and the bankrupt, without the opportunity of an examination *viva voce* ; finding it impossible upon the contents \* of these documents, the examination and this book, to believe, that, according to this certificate, a full discovery has been made : nor have I the means of helping myself ; as I doubt, whether it is quite correct to require the Commissioners to review their certificate as to that part, which relates to the point, whether the discovery is full or not. If I have not the means of sending it back, and the bankrupt has a right to the benefit of this, as a proceeding so far towards his certificate, neither have I the means of determining, how the difficulties, which have made a strong impression on my mind, were solved by the Commissioners. Judging, as I must, of the credibility of what is sworn, upon this, as a question of fact, before a jury, whether it is possible to believe this man, swearing, that he has no other written documents, than the book, which he produces, proving by its contents, if not a false document, that it must have been compiled, not from memory, or daily entries, but from other written documents, my conclusion is rather, that I have no more reason to believe, than to doubt, that he has made a full discovery.

1. As to the extent to which commissioners of bankrupt have an independent judicial character, see, *ante*, the note to *Ex parte King*, 11 V. 417 ; and the note to *Taylor's case*, 8 V. 328.

2. That the court is always humanely cautious not to delay a bankrupt's certificate on questionable grounds, see the note to *Ex parte Heath*, 6 V. 613 ; and, though the legislature has left it to the discretion of the creditors, whether they will, or will not, sign their debtor's certificate (*Ex parte Cridland*, 3 Ves. & Beat. 103), yet, when they have done this, the commissioners have no duty but to see

more, required to sign the certificate, is reduced from four to three fifths in number and value. By Statute 6 Geo. IV. the former amount is restored until after six calendar months from the last examination : from that period three fifths in number and value or nine tenths in number are sufficient ; and some further regulations are made as to the Certificate.

that the bankrupt has conformed to the statute; and, then, neither can they refuse to sign, nor the Lord Chancellor to allow, the certificate on the ground of the bankrupt's misconduct, antecedently to the issuing of the commission: *Ex parte Gardner*, 1 Ves. & Beat. 47; *Ex parte Joseph*, 18 Ves. 342. But, before a certificate is allowed, any of the creditors of the bankrupt may be heard before the Lord Chancellor: see the 122d section of the statute of 6 Geo. IV., c. 16, which section also declares what signature by creditors shall be requisite, before the commissioners can certify to the Lord Chancellor; and the 124th section of the said act prescribes the mode in which the signature of creditors must be proved.

## BERNEY v. HARVEY.

[1810, MAY 22, 28; JUNE 25, 26.]

To a Bill for tithes, even by a lay impro priator, prescription *in non decimando*, or presumption from mere retainer, without color of title, is no defence; and will not be sent to law.

THE Plaintiff claimed under the Will of his grandfather John Berney, who died in October 1800; as being entitled in fee-simple to the rectory or parsonage impro priate of the parish of Fundenhall in the county of Norfolk, and the advowson of the vicarage of Fundenhall; and, as such impro priator, to all the tithes of corn and grain and other great and small tithes whatsoever, arising, &c. [\* 120] \* within the said rectory and parish, &c. and prayed accordingly an account against occupiers of lands within the said rectory and parish since October 1800.

The Defendants, the occupiers, by their answer, as to part of the lands, occupied by them, called Woodland, denied the title of the Plaintiff as such impro priator, to tithes, or any satisfaction in lieu of them; alleging, that no tithes have been paid for those lands within the memory of any person; and that the Defendant Wilson, who is the owner of the said lands, claims to be, and is, entitled to the tithes thereof: and insisting, that, before this suit can be supported, the Plaintiff ought to proceed to establish his title at law to the tithes.

As to the other lands the Defendants set up an agreement for a composition; insisting, that such composition is still binding: the notice for determining it not being regular.

The Defendant Wilson stated, that he was seised in fee of the lands, called Woodland, consisting of 126 acres; all of which he believes were formerly woodland, and part is still covered with wood; but other parts were many years ago converted into arable and pasture. He farther stated, that he was informed and believes, that the rectory of Fundenhall formerly belonged to the nunnery of Flexton; and upon the dissolution of that monastery the rectory came to King Henry VIII.; who in the year 1536 granted it to Richard Stephens and George Buck: and it has ever since continued in lay hands as a lay fee; and no instance can be shown of the tithes upon said one

hundred and twenty-six acres having been rendered or taken, or any satisfaction for them made to the rector or his lessees, or \*agents: but the same have for a great length of time [\* 121] back, and much more than sixty years before the death of John Berney, and longer than any living evidence will reach, been retained by the occupiers of the said lands for the time being; who have nevertheless usually rendered to the rector, his lessees, &c. the tithes of the other lands; or made him satisfaction for the same. The Defendant insisted, that under such circumstances it must be presumed, that the Defendant is seized of the said tithes; and that the tithes of the said rectory having in manner aforesaid nearly three hundred years ago become a lay fee, the title to such tithes is a mere question at Law; and the Plaintiff ought to proceed to establish his title at Law, before he is entitled to file any Bill in respect thereof.

A settlement, produced in evidence, contained the following description of the premises: "And also all that the rectory, and parsonage impropriate of Fundenhall, with its rights, members, and appurtenances, in the said county of Norfolk, and also all the glebe land, tithes, obventions, oblations, emoluments, profits, tenements, and hereditaments, parcel of the said rectory, or to the same in any wise belonging or appertaining, or therewith used, occupied, or enjoyed, accepted, reputed, or taken, as part, parcel, or member, thereof; and all advowsons and free dispositions of advowsons thereof and of the vicarage to the same belonging in Fundenhall aforesaid, in the said county of Norfolk."

By a lease, dated the 20th of June, 1709, Thomas Berney, impro priator of the impropriation of Fundenhall in the said county of Norfolk, &c., demised all the houses, out-houses, barns, stables, yards, gardens, and grounds of him, the said Thomas Berney, situate, lying, and being \* in Fundenhall aforesaid, be longing to him as impropriator of the impropriation of Fundenhall aforesaid, and also all the glebe lands, belonging to the said impropriation; and also all the tithes, both small and great, of what nature or kind soever, yearly arising, renewing and growing due, within the precincts of the said Town of Fundenhall aforesaid, unto him, the said Thomas Berney, as impropriator of the said impro priation. Other leases, in 1698 and 1699, with the same description, were produced.

Mr. Hart and Mr. Heald, for the Plaintiff.—The Plaintiff is entitled to a Decree for tithes in kind against the occupiers. They admit their occupation of these one hundred and twenty six acres, called Woodland; and that they have paid no tithes; not setting up any defence, either a *Modus*, or title to the tithes themselves; but merely prescribing *in non decimando*, that these lands are exempt from tithes; alleging, that no tithes have been paid for the same within the memory of any person; and that Wilson, the owner of the land, claims to be, and is, entitled to the tithes: but of the nature of his title they are ignorant; and they in-

sist, that the Plaintiff ought to establish his title at Law. Wilson, who was made a party by amendment, does not set up any title to the tithes in a way, which this Court can notice. His answer amounts to no more than that no tithes have been taken for more than sixty years; but the tithes were retained by the occupiers; paying tithes for other lands.

This being a defence merely *in non decimando*, the Plaintiff, whose title, as lay-impropriator, is admitted, has a right to a Decree. The distinction is, that, where the Defendant insists upon a title [\* 123] in himself, by \* ecclesiastical letting, or otherwise, an issue is directed; but where he requires the Court to presume against the right from the non-payment, a Decree for tithes is made. This is no assertion of title; but a mere allegation of retainer of the tithes; from which, it is contended, a conveyance ought to be presumed; but the case of *Nagle v. Edwards* (1), followed by *Lord Petre v. Blencowe* (2), has settled, that a presumption cannot be so raised against the ecclesiastical right, even in a lay-impropriator. The case of *The Aldermen and Burgesses of Bury St. Edmunds v. Evans* (3), is a leading authority to the same effect; that, whenever the defence rests solely on length of time, without any exercise of ownership, the mere retainer of the tithes is not sufficient. The defence in that case, that a legal discharge was to be presumed, is in substance the same as in this the presumption, that the Defendant is seized of the tithes: the effect of both being a plea of prescription *in non decimando*.

Lord Loughborough in the case of *Rose v. Calland* (4), throwing some imputation upon those decisions of the Court of Exchequer, in the case of a purchaser, does not go the length of deciding against them; or intimate, that they do not form the rule as between the impropriate rector and the occupier; and your Lordship in a subsequent case threw out an opinion, that the retainer of tithes by the owner of the estate might be accompanied by such circumstances, that, admitting the rule to be according to *Nagle v. Edwards* upon the simple fact of retainer, that species of possession of the tithes in the hands of the owner for a long period, might be so confirmed [\* 124] by concomitant circumstances, as, though not \*amounting to evidence of title against the rector, to raise a presumption of a grant of the tithes; though it may not be possible to trace at this period, how they were severed.

This case however has no circumstance beyond the simple fact of withholding the tithes for raising such a presumption; and there is something like evidence, by which that may be accounted for; opposing the inference, that there ever was in fact any conveyance of the tithes. The Answer admits, that these one hundred and twenty-six acres, called Woodland, and which by an ancient map and plan

(1) 3 Anstr. 702; 4 Gwil. 1442.

(2) 3 Anstr. 945; 4 Gwil. 1484.

(3) Com. 643; 2 Gwil. 757.

(4) *Ante*, vol. v. 186; *Heathcote v. Aldridge*, 1 Madd. 236.

appear to have been wood-land, even within a moderate period, are the only lands, that have not paid tithes. When they were converted into arable does not appear: but that they were, and are still called, Woodland, is a strong circumstance. All the ancient deeds convey the rectory, without any ground for implication, that the owners did not deal with the whole rectory as their own. The description is sufficiently large to take in the whole tithes of the parish from 1670.

The case of *Strutt v. Baker* (1) is of a very different description from that of an occupier, setting up a mere retainer by way of plea *in non decimando*. There was actual occupation, under various deeds; and the rectory was sold, as entitled only to one third of the tithes; with reference to which the lands were described as *thirtiethable* land. That was a case therefore, not of presumption, but positive title asserted. The case of *Scott v. Airey* (2), from a mss. note of Lord Redesdale, is also the case of a Defendant setting up a title himself; and the Bill was dismissed on that ground; and \**Fanshaw v. Rotheram* (3) is another instance. Those [\* 125] cases have no application either to this or *Rose v. Calland*.

Sir Samuel Romilly and Mr. Bell, for the Defendants.—The short question is, whether in the case of a lay-impropriator, the rectory, and all belonging to it, having been for centuries in the hands of laymen, capable of alienation as any other property, such a Bill as this can be maintained without first establishing the title to these tithes at law. The answer, stating a grant of this rectory by King Henry VIII. alleges, that there is no instance of any payment of tithes for these lands, as for any other lands; that it is to be presumed therefore that the Defendant is seised of, or well entitled to, the tithes. Setting aside the effect of the authorities, which are only those, that have been mentioned, upon principle there is little difficulty. Though no presumption can arise against the Church, who are incapable of alienation, when once the property has come to lay hands, capable of alienation as any other property, there is no reason against raising the presumption from long possession, as in any other case. There is no authority upon the question now before the Court. In *The Aldermen and Burgesses of Bury St. Edmunds v. Evans* (4), the Defendant insisted, not upon this defence, the presumption from long possession in lay hands, but upon a prescription *in non decimando*; which it was held, would not prevail against a lay, any more than against an ecclesiastical, rector; as it must have had its origin at a time, when the church was incapable of alienating. In the course of the learned and elaborate judgment upon that case this question upon the presumption of alienation after the time, when the \*rectory passed to laymen, was not [\* 126]

(1) *Ante*, vol. ii. 625; 4 Gwil. 1430.

(2) 3 Gwil. 1174.

(3) 3 Gwil. 1177.

(4) Com. 673; 2 Gwil. 757.

considered. Upon what peculiar ground is length of time, which gives protection to all other property, to make the title to this, though in the hands of laymen, weaker, by increasing the difficulty of proving the instrument? The leases produced, speaking of the tithes within the town, not within the rectory, afford a strong presumption, that the rector did not consider himself entitled to all those tithes. This is, not the common case of retainer, but actual pernancy; a composition with the tithe-owner for the tithe, not of the whole, but of a particular part of the land; reserving the other tithes: a case never yet distinctly determined: the rector treating with the person, in possession of the estate, for the tithe; actually paying for part, and not paying, but retaining, the rest: a case very important; and most proper for the consideration of a Jury; to ascertain under what circumstances the payment of part was received, and the tenant permitted to retain the rest without account or satisfaction.

Mr. Hart's Reply was stopped by the Court.

The Lord CHANCELLOR [ELDON].—I argued the case of *Scott v. Airey* for the Defendant; who did not set up a prescription *in non decimando*; but asserted a positive title; showing, not merely non-payment, but that those tithes had been the subject of conveyances, leases, wills; and had been always treated as their own property as much as the land. Against the objection I urged, that a portion of the tithes might have belonged to some religious house; and, having got to the Crown, might have been granted to those from whom he claimed. The Court took this distinction: that, if we had nothing to show but the mere retainer of the tithes, not an actual grant, or pernancy, or that we had, in our title-deeds, treated [<sup>\*</sup> 127] the property \* as belonging to us, the mere retainer would not raise the presumption against any one; not against a spiritual rector; nor upon *Fanshaw v. Rotheram* (1) against a lay-rector. That was the case of a lay-impropriator; the Defendant was a person, not prescribing *in non decimando*, but claiming title to the tithes in pernancy; and the doctrine of the Court in that case also was, that a mere retainer, unexplained by any deed, or instrument, asserting title, not merely to retain, but to enjoy, is not a defence against a spiritual person or a lay-impropriator. If on the other hand, it appeared in the case of a lay-impropriation, that the Defendant had lands which never paid tithes, and had made them the subject of lease, or conveyance, under color of title, coupling the fact of retainer and the color of title, they considered that a sufficient ground for sending it to law: but if no more was alleged than a mere case of retainer, and prescription *in non decimando*, they would not send that to law.

This doctrine therefore has been settled a great length of time; and admitting, that it was brought considerably into question by Lord

Loughborough in *Rose v. Calland* (1), if it has been the prevailing notion in Westminster Hall, and constantly acted upon in the Court of Exchequer, I think, I should act very rashly in departing from it. If it can be set aside, that will take place with much more propriety in the House of Lords than in this Court. There was a decision of the Court of Exchequer in the year 1727 against that doctrine ; and both Lord Talbot and Lord Hardwicke struggled against it, but ineffectually.

I cannot agree to the distinction of compounding for part, and not paying for another part. Can that be more \*strong [\* 128] than actually paying tithes for one part, and not for another. I will look at the abstract of the leases ; to see, whether this is part of the rectory, or not, according to the point, that has been made by Mr. Bell ; but, if I find nothing in that, I do not think, that I ought now to disturb this doctrine, which has prevailed so long ; whatever I might originally have thought of it.

1810. June 26th. The Lord CHANCELLOR [ELDON], having seen the abstract, expressed his opinion against the Defendants upon the point reserved, as too nice a criticism. The account was therefore decreed, according to the prayer of the Bill, from October, 1800, with costs.

SEE, ante, the notes to the *Canons of St. Paul's v. Crickett*, 2 V. 563 ; note 1 to *Strutt v. Baker*, 2 V. 625 ; note 1 to *Rose v. Calland*, 5 V. 186 ; and the notes to *O'Connor v. Cook*, 6 V. 665, with the farther references there given.

### EARL COWPER v. BAKER.

[1810, JUNE 27.]

INJUNCTION against Trespass upon irremediable mischief, in nature of Waste, on a Bill by the Lord of a Manor and his lessees against taking stones, having a peculiar value, found at the bottom of the sea within the limits of the Manor (a).

THE Bill, filed by Lord Cowper, as lord of the manor of Swallowcliffe, and his lessees, stated the title of Lord Cowper under a settlement in 1805, as tenant for life, without impeachment of waste ; subject to a trust term ; with power of leasing ; that the manor extends along the sea side, and into the sea ; as far as a buoy as big as a barrel can be seen ; and that certain stones or argillaceous productions, called noddles of clay, are necessary materials for making

(1) *Ante*, vol. v. 186 ; see the references.

(a) As to injunctions to prevent waste, see *ante*, note (a) *Smith v. Collyer*, 8 V. 89 ; 2 Story, Eq. Jur. § 909 to § 921 ; and particularly as to injunctions in cases of trespass, see *ante*, notes (b) and (c) *Hanson v. Gardner*, 7 V. 305.

a terras or cement, invented by James Parker ; for which he had obtained a patent ; that such stones are very scarce and valuable ; and are produced upon, and adhere to, rocks within the limits [\* 129] \* of the manor, as well between high and low water mark as in the sea below low water mark ; that they are by the violence of the sea separated from the rocks ; and are found lying at the bottom of the sea, and on the shore within the limits of the manor.

The Bill farther stated, that the patent will expire on the 28th of this month ; that the Plaintiffs Charles Pearson and his son had taken a lease of the manor for one year ; and the Defendants Baker and Hill have dredged up, and otherwise collected, within the limits of the manor large quantities of the stones ; that the lords of the manor from time whereof the memory of man runneth not to the contrary have used the right of wreck, and also the sole and exclusive right of making oyster-beds and taking oysters within the same limits. The Bill then suggesting pretences by the Defendants, that they have taken small quantities of these stones from this manor, with other stones from other parts, and cannot distinguish them, and charging, that large quantities were taken from the manor, and that the Defendants threaten to remove them, so as to prevent the Plaintiffs the Pearsons from ascertaining the amount, that they will be deprived of the benefit of their agreement, and sustain irreparable damage, and that the Plaintiff Earl Cowper will be prevented from demising the manor at so high a rent as he otherwise might, prayed an account of all stones or other argillaceous productions, collected and carried away from the sea or shore within the limits aforesaid since the 25th of March last, and an Injunction.

Sir *Samuel Romilly* and Mr. *Garratt*, moved for the In- [\* 130] junction, upon affidavits ; referring to the late cases (1), \* extending this jurisdiction to trespass, upon the ground of irremediable mischief in the nature of waste.

The Lord CHANCELLOR [ELDON] made the Order, granting the Injunction until Answer or further Order.

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SEE the note to *Smith v. Collyer*, 8 V. 89.

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(1) *Robinson v. Lord Byron*, 1 Bro. C. C. 583; *Mitchell v. Dors*, ante, vol. vi. 147, and the note; *Crockford v. Alexander*, xv. 138.

## ROGERS v. GOORE.

[1810, JULY 3.]

PLAINTIFF, under an Undertaking to speed his cause, obtained an Order to withdraw his replication, and set down on Bill and Answer; but did not serve a Subpœna to hear judgment; or appear, when the cause was called. The Bill was dismissed with Costs.

UPON a second Motion to dismiss the Bill for want of prosecution the Plaintiff entered into a peremptory undertaking to pass publication, and set down the cause in the next Term. He afterwards obtained an Order, as of course, to withdraw the Replication, and amend the Bill. An application was made to discharge that Order; and it was discharged: but leave was given to the Plaintiff to set down the cause upon Bill and Answer. He set down the cause accordingly; but did not serve a subpœna to hear judgment; and, when the cause stood in the paper, and was called on, he did not appear.

Mr. William Agar, for the Defendant, insisted, that the undertakings of the Plaintiff were equivalent to serving the subpœna to hear judgment; as otherwise by setting down his cause he gains considerable time: the Defendant therefore should have the same advantage by his not appearing, as if the subpœna to hear judgment had been regularly served.

The Lord CHANCELLOR [ELDON] said, that was his opinion; and accordingly dismissed the Bill with costs (1).

As to the cases in which it is a motion of course, according to the present rule of practice, for a plaintiff to have leave to withdraw his replication; and under what circumstances a special application is necessary; see, *ante*, note 2 to *Jennings v. Pearce*, 1 V. 447; and, with respect to the general rules as to dismissal of a bill for want of prosecution, see the notes to the *Anonymous case*, 2 V. 286.

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(1) In *Ellis v. King*, 5 Madd. 21, the Plaintiff not appearing, according to his Solicitor's undertaking to appear without a Subpœna to hear judgment, the Vice Chancellor held, that the Bill could not be dismissed for want of an affidavit of service of the Subpœna; and that the cause could only be struck out.

As to the costs, see *ante*, *Bayly v. The Corporation of Leominster*, vol. i. 476, and the note, 477.

## TUCKER v. THURSTAN.

[1810, JULY 4.]

AN Equity of Redemption is within the Exception in the Annuity Act, Stat. 17 Geo. III. c. 26, s. 8.  
Mortgage in fee after a devise a revocation *pro tanto* only (a), [p. 134.]

THE Bill stated, that Stephen Amhurst was in May 1804 seised of or entitled to the equity of redemption of freehold estates in Farleigh and other places in the county of Kent; which had been mortgaged to William Wilkins; and being so seised he contracted with the Plaintiff for the sale to him of an annuity of 200*l.* for the lives of William Cruckshank and Charles Evered and the survivor at the price of 2000*l.*; and by indentures, dated the 5th of May, 1804, Amhurst granted an annuity accordingly, charged upon the manors, messuages, farms, lands, &c. situated in the county of Kent, of or to which the said Stephen Amhurst was seised or entitled for any estate of freehold of inheritance, or of freehold only; and a term of two hundred years was created to secure it.

By indentures, dated the 16th of August, 1804, a similar annuity, secured in the same manner, was granted by Amhurst to the Plaintiff. In August 1805 Amhurst conveyed the estates, on which those annuities were charged, with other estates to trustees in trust for his creditors; and the trustees under that deed entered into a contract for the sale of the equity of redemption.

The Bill, charging the purchaser with notice, prayed an account of what is due for the arrears of the annuities; that the Plaintiff may be declared to have a lien on the estates for the arrears and future payments; and an Injunction, restraining the trustees from selling the estates remaining unsold, and from parting with the purchase-money of those, which had been sold.

[\* 132] \* The Defendants, the Trustees, pleaded the Annuity Act: and that no Memorial was registered.

Mr. Hart and Mr. Bell, in support of the Plea, contended, that this grant was subject to the provisions of the Annuity Act (1); and not within the exception (2); providing, that the Act shall not extend to any annuity, secured upon lands of equal or greater annual value, whereof the grantor was seised in fee-simple or fee-tail in possession at the time of the grant. The grantor could not be considered either in Law or Equity as seised in fee-simple or fee-tail at the time of the grant, within that clause; which, regarding particularly the value of the interest, cannot apply to estates in mortgage, perhaps to their full value. As entitled to the equity of redemption his pos-

(a) See *ante*, note (b) *Brydges v. Chandos*, 2 V. 417; note (b) *Knollys v. Alcock*, 5 V. 648; note *Harmood v. Oglander*, 8 V. 128; and particularly notes (b) and (c) *Ex parte Ilchester*, 7 V. 348.

(1) Stat. 17 Geo. III. c. 26; repealed by stat. 53 Geo. III. c. 141; see the note, *ante*, vol. ii. 36.

(2) Sect. 8.

session was only that of tenant at will. In *Lyster v. Dolland* (1), which occurred soon after *Shrapnel v. Vernon* (2), it was held, that an equity of redemption of a term cannot be taken in execution : a point, which received much consideration lately in *Scott v. Scholey* (3) by the Court of King's Bench ; who adopted Lord Thurlow's opinion.

Sir *Samuel Romilly*, for the Plaintiff, was stopped by the Court.

The Lord CHANCELLOR [ELDON].—My opinion is, that this is within the exception in the Annuity Act. This Act either justifies the Courts of Law in taking notice of equitable interests, or does not apply to equitable interests ; and upon the latter hypothesis the grant of an annuity out of an equity of redemption is

\* not within the Act; as a man, having merely an equity [\* 133] of redemption has neither an estate in fee or in tail in possession ; and, strictly speaking, has no interest in contemplation of Law, out of which such a grant can be made. If before this Act of Parliament passed, a person, having not a trust estate, as contrasted with an equity of redemption ; (which are in many respects most materially different) ; but an equity of redemption of an estate, mortgaged in fee, had granted an annuity, that would without doubt have been established in a Court or Equity ; where, though not at Law, this interest is acknowledged ; and would before that Statute have been rendered liable to the annuity. Since the Act, if the Courts of Law are to take no notice of equitable interests, they have no concern with the question, whether this is, or is not, a good annuity : if they do take notice of equitable interests, whether the interests of both grantor and grantee are equitable, or, the grantees interest being equitable, that of the grantor is legal (as it may frequently be, for instance, where the annuity is granted out of an estate, of which the grantor is seised in fee in possession, but subject to a charge by the Will of his ancestor), then upon the case, that has been put, that the estate may be covered with mortgages, the clause as to the value cannot apply. Many cases of difficulty however are not looked to by this Act. The value of the estate may be affected as much by mortgages for terms of years as by a mortgage in fee. The true point is, whether Courts of Law are authorized to look at the Statute, taking into their consideration the effect of equitable interests ; and, if they take notice of equitable interests of one species, why should they not of those of another ; subject to this qualification ; that they must be equitable interests of such a nature as this Court regards as substantially equal to the ownership in fee or in tail. Suppose a mortgage in fee after a devisee : the devisor is \*still the equitable [\* 134] owner ; and the devise a revocation *pro tanto* only (4) ; and many other cases of a similar class may be put.

(1) 3 Bro. C. C. 478; *ante*, vol. i. 431.

(2) 2 Bro. C. C. 268.

(3) 8 East, 467.

(4) See *ante*, *Harmood v. Oglander*, vol. vi. 199; viii. 106, and the references in the note, vi. 201.

The conclusion is, that either the Statute has no relation to this, or this is the equitable ownership in fee, protected by the last clause of the Act.

The Plea was over-ruled.

1. An equity of redemption is not a mere trust, but a *title in equity*; and the right of redemption may be maintained against the Crown, if, by attainer or escheat, the legal estate should devolve on the Crown; the King, it has been said, cannot be called on to reconvey, but an *amovebas manum*, only, lies in the cases of escheat or forfeiture: however, another remedy is now provided by the statute of 39 and 40 Geo. III. c. 88, s. 12. The diversity between a trust, and a power of redemption, is this: a trust is created by contract, and may be directed as the parties thereto please: they may provide for the execution of it as they think proper; and, therefore, one who comes in in the *post* will not be liable to the trust without an express provision to that effect: for they only are bound by a trust who come in in privity of estate (in the *per*, as it is technically called), or with notice, or without consideration: but a power of redemption is an equitable right, inherent in the land, and binds all persons in the *post*, or otherwise: *Pawlett v. The Attorney-General*, Hardr. 467, 469; *Catesbie's case*, Lane, 39; *Wilkes's case*, Lane 54.

2. As to the cases in which enrolment of an annuity is unnecessary, see the concluding part of note 2 to *Byne v. Vivian*, 5 V. 604.

3. A mortgage of a previously devised estate is a revocation of the devise only *pro tanto*: see note 4 to *Brydges v. The Duchess of Chandos*, 2 V. 417.

### WARD v. GARNONS.

[1810, JULY 4.]

The existence and execution of a settlement by Indentures of lease and release presumed from circumstances: principally the existence of the Drafts; the statement in an abstract of the title; and the existence of the lease for a year of other estates, appearing to have been included in the same plan of settlement.

The production of a paper, importing to be an attested copy, may with other evidence have considerable weight, [p. 140.]

By the Decree, pronounced in this cause at the Rolls, on the 27th of June, 1809, the Master was directed to inquire, whether the settlement, in the Bill stated to have been made by indentures of lease and release of the 8th and 9th of May, 1760, was executed.

The Master's Report stated, that after the death of the testator, Richard Hill Waring, upon a search among his papers the deeds could not be found; (except the lease for a year of his estates,

which is existing:) but the produced draft was found;

[\* 135] \* purporting to be the original draft of the indenture of release, dated the 9th of May, 1760; that an abstract was also produced; containing an abstract of the indentures of lease and release, dated the 8th and 9th of May, 1760: the latter being tripartite; and made between Richard Hill Waring, of, &c., of the first part, Margaret Wynne, of Leeswood, of the second part, and

Sir Rowland Hill and John Paterson, of Barber's Hall, of the third part; reciting an intended marriage between Richard Hill Waring and Margaret Wynne; and declaring, that in consideration thereof, &c., Richard Hill Waring conveyed his estates in the county of Salop to the uses therein mentioned; and Margaret Wynne conveyed to Sir Rowland Hill and Paterson, various estates; to hold to them, their heirs and assigns, to the uses after expressed: namely, to the use of herself and her heirs until the marriage; and afterwards to Sir Rowland Hill and Paterson for one thousand years; and subject to that term, to Richard Hill Waring for life, without impeachment of waste; with remainder to Margaret Waring in the same manner; with remainder to trustees, to preserve contingent remainders; remainder to trustees for five hundred years; remainder to such son or sons, daughter or daughters as Margaret Waring should by Deed or Will appoint; with remainders to the first and other sons in tail, and to the daughters, as tenants in common in tail: remainder to such persons as Margaret Waring should appoint by Deed or Will; with the ultimate remainder to Margaret Waring, her heirs and assigns for ever, and powers of leasing, &c.

The trust of the term of one thousand years was to raise, as soon as conveniently might be, by mortgage 3000*l.*; to be applied, first, to pay what was due upon a mortgage made by Richard Waring, the father, of part of the premises in the county of Salop, then vested in \*Sir Rowland Hill, for securing 1850*l.* [\*136] and interest; and the residue of the said 3000*l.*, if any, to be paid to Richard Hill Waring. The trust of the term of five hundred years was to enable Mrs. Waring to appoint an annuity, not exceeding 100*l.* for a second husband, and to raise 2000*l.* for the children of the intended or any future marriage.

The Report farther stated the proof of the different hand-writings of Paterson, who, it was alleged, prepared the deed, and of his clerk: all the draft being written by the clerk; except the corrections, by Paterson himself: referring to the number of skins; and stating, that two parts were engrossed; the affidavit of one of the executors of Paterson, that the deponent never saw any journals or accounts of the business, done by him, as an attorney; and another affidavit, stating, that John Derbyshire was a person of strict honor and integrity; that the indorsement upon the abstract produced, the two first lines, all the corrections, and the marginal notes, were in his hand-writing; and from the correct manner in which he conducted his business, as an attorney, the deponent believes, he would not have prepared an abstract, unless fully satisfied of the existence of the original deed; and proving the hand-writings of Mr. Derbyshire in a case upon that abstract, and of Mr. Hayward, whose opinion was taken upon it.

The Report then stated the Will of Richard Hill Waring; charging his estates at Ince with the payment of some annuities; and giving his real estates to his wife for life without impeachment of

waste; with a power of appointment in fee: and in default of appointment to his own right heirs; subject to the annuities; then reciting, that before his marriage with his wife she did, by certain indentures of lease and release, demise and grant all or a considerable part of the messuages, lands, &c., in the county of Kent to Sir Rowland Hill and John Paterson, their executors, &c., for 1000 years, upon trust to raise 3000*l.*; stating the trust, according to the abstract, to pay what was due upon the mortgage of 1850*l.*, and the residue to the testator, the testator requires the trustees to raise that sum of 3000*l.*, as soon as conveniently may be; and to discharge the mortgage, and pay to his wife the residue; which he gave to her with all the rest of his personal estate, for her own use, subject to his debts and legacies.

Mrs. Waring died in the life of her husband without issue. The sum of 3000*l.* was never paid: but in 1792 the testator discharged the mortgage of 1850*l.*

The Master stated, that the abstract, found among the papers of the testator, was made on the application of him and his wife to Mrs. Roberts for a loan of 3600*l.* on the mortgage of the said estates, and upon the circumstances aforesaid the Master presumed, and upon such presumption found, that such deed was executed by the parties.

To this Report an Exception was taken; alleging, that the Master ought to have reported, that the said settlement was not so executed; as there was not produced any admissible evidence of the execution, or even existence, of such deeds, or either of them; and as the Report is founded upon inadmissible evidence.

Mr. Benyon, in support of the Exception.—From these three instruments, the draft, the abstract, and the Will, the Court is not justified in presuming, that this deed was executed.  
[\* 138] Such secondary evidence can \* be admitted only where there is original evidence, that the deed once existed. The abstract of this deed is no evidence. It might be a copy from the draft; and therefore more liable to objection. It is supported merely by the allegation, that it was made by an accurate man; who would not have made an abstract without seeing the deed. As to the Will, the objection is, that the representative claims his money upon his assertion in his own cause, that he was entitled to this sum of 3000*l.* That can be no evidence of his title; or afford any ground of presumption. This does not resemble the case of *Warren v. Greenville* (1); where the charge of the attorney for drawing the last deed was produced. Even an attested copy is no evidence; unless the person who made it, is existing to prove it.

Sir Samuel Romilly and Mr. Daniell, for the Plaintiff.—The conclusion of the Master, upon all the evidence before him, that such a deed was executed, is right. Upon this evidence the

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(1) 2 Str. 1129; see 2 Burr. 1071.

verdict of a jury, that it existed, could not have been set aside; though certainly your Lordship will exercise your judgment in a different way from a Court of Law upon a motion for a new trial. A lost deed could scarcely ever be proved, if an attested copy could not be received in evidence without examining the person, who had compared it with the original. It is material to consider, what the deed was. Mr. Waring enjoyed this estate for many years after the death of his wife; not as tenant by the courtesy; there being no issue: he could have no title except by the settlement. The lease for a year of his estate is in existence; and, with regard to her estate, the facts that are proved, can be accounted for only upon the hypothesis, that this \* settlement was executed: [\* 139] the draft, corrected in the handwriting of Paterson, the attorney of Mr. Waring: all the rest proved to be written by his clerk; the abstract, made by Mr. Derbyshire, proved to have been a most accurate man: his attention upon that occasion appearing by the observations in his hand-writing: as to one instrument stating, that "this is only an attested copy: the original cannot be found;" and that instrument is fully stated, not merely the effect abstracted. There is nothing to rebut the presumption from all this evidence. The case of *Skipwith v. Shirley* (1) is much stronger than this.

**Mr. Benyon**, in reply.—The foundation of this Exception is, that this sort of evidence cannot be admitted. It is true, there has been enjoyment; showing, that Mr. Waring was tenant for life: certainly not as tenant by the courtesy: that enjoyment may be consistent with any other settlement; under which he would probably have had an estate for life: but is no proof, that he took it under a settlement, creating this term; of the existence of which there is no evidence. The lease for a year, that does exist, is of another estate, his estate, not her's. In the absence of legal evidence, what presumption arises, that her estate was settled: and this sum of 3000*l.* was to be raised upon it? The abstract, stating as to some of the deeds, that they were executed by the parties, takes no notice of the execution of this deed. It cannot be denied, that such a deed was in contemplation: but that frequently is not followed by execution; and here is no necessary conclusion, that the abstract was taken from an executed deed or the draft followed by a deed. In *Skipwith v. Shirley* there was legal evidence: the charges in the \* attorney's book; yet both that and the case in Strange are perhaps to be considered rather as cases of anomaly and exception. [\* 140]

**The Lord CHANCELLOR [ELDON].**—The question I admit to be important, whether the evidence in this case, which must be taken clearly to prove the contents of the deed, if a deed ever existed, is also sufficient in law to prove the existence of it; by which I mean also, whether the evidence is admissible as well as sufficient and effectual. I agree, that the mere production of a paper, importing to

be an attested copy, without more, is hardly sufficient to prove anything: but that such paper may with other evidence, before given, become itself of considerable weight, must also be admitted. I have here the draft of a settlement, either executed, or intended to be executed, upon the marriage of Mr. Waring and Miss Wynne: not only her estate, but his estate also, to be settled by the same deed. The circumstance, that it was intended to comprehend both estates, makes the fact of finding the lease for a year, though of his estate only, not her's, material: as that was a step at least towards an act, which upon the face of this instrument was intended with regard to his estate, if not her's. This draft, to which the hand-writing of Mr. Paterson, a person of great professional credit, is proved, appears to have been perused with great attention. There are references in the margin to the number of the skins; intimating, that some parchment was at least prepared for execution, if not executed; and there is a memorandum, that two parts were engrossed; each of sixteen skins. This is at least evidence, that the settlement [\* 141] was prepared. In *Skipwith v. Shirley* (1) there \*was a charge for attending the execution: but if that item had stood only as an entry "attending execution," and no charge made, it would have been left to a Jury, that if he had attended the execution, there would have been a charge; and the inference therefore was, that he intended to attend: but that there was no execution; as there was no charge for it; which would probably have been made, if due.

Upon this evidence however, connected with the other evidence I have to state, the question is, whether this instrument and the engrossment were not at least prepared: but, assuming that, it does not follow, that the instrument was executed. It is therefore necessary to look at the other evidence; and first, to observe, what would have been the operation of the deed, if it was actually executed. With regard to the estate of Mrs. Waring, subject to a term of one thousand years in Sir Rowland Hill and Mr. Paterson, the intended husband was to be tenant for life without impeachment of waste; with a similar limitation to her; with remainders to the children in tail, and limitations over; and many powers and provisoies with regard to that estate. The effect therefore is, that, if the deed had been executed, he would have been tenant for life, subject to the term for raising 3000L.

It is then proved by evidence, perfectly sufficient, that Mr. Derbyshire, a professional man of considerable business, on behalf of Mr. and Mrs. Waring laid before the Recorder of Chester an abstract of the title; acting upon that occasion as the agent of persons, anxious to raise money; who may therefore be considered as stating truly what they state in a manner directly adverse to their interests.

The first instrument, appearing in that abstract, is dated in [\* 142] August 1795; and the \*observation of Mr. Derbyshire in

the margin is in his own hand-writing is, "this is only an attested copy: the original cannot be found;" showing his anxiety to distinguish between originals and copies, as evidence of title; and the observation is correct, with regard to this instrument, referring to an attested copy, he gives it fully; not merely stating what would be the effect of the deed. He adds "executed by George and John Wynne." The argument of Mr. Benyon upon that is, that he distinguishes where the deed was executed, and where it was not executed: but the misfortune of that is, that there is only one other deed out of nine, contained in this abstract, which appears to have been executed: a deed in 1757; upon which there is this note, "executed by all the parties, and properly attested."

There is also a transcript of a recovery in 1757; showing the attention that he gave to this title; observing, that it was not sufficient to comprise some wood. This deed of 1760 is then stated: the abstract giving that part only, that relates to her estate; as, the purpose being to raise money on her estate, it was not necessary to state the rest; and the effect of the abstract is exactly what it should be, if taken from the original; stating all the limitations, and the trusts of the terms of one thousand years; and five hundred years; and the fact, that the marriage took effect; that there was no issue, or any probability of issue: Mrs Waring being at the age of fifty-three; and the question put is, whether a security can be made to Mrs. Roberts; and what steps should be taken for that purpose.

The fact, that these deeds were produced before the Master, does not appear: but it is not represented as the subject of doubt, that, with the exception of the deed of 1760, they might have been produced. If the title is to be taken, as it stood [\* 143] previous to that year, it is one, by which Mrs. Waring acquired the fee under the recovery, which is adverted to with so much precision, that a deficiency in the number of acres is pointed out. Except in argument there is no suggestion of any other settlement; by which her interest might have been reduced below what she would have had under that recovery. That might be, by possibility; but, am I to contrast the title, as it might by possibility have been, with what it probably was; when so much evidence is laid before the Court? Considering Derbyshire as their agent, this is on their part a direct admission that their interest was as tenant in fee; and even against a married woman the attorney's books would be evidence in such a case.

The opinion of Mr. Hayward points out what is to be done; and directs an assignment of the term of one thousand years by the trustees; observing, that it can be assigned only for 1150*l.*; as the remainder of the 3000*l.* was to be applied to another purpose. The question then is, whether, so much appearing to have been done in the year 1760, though the attorney's books cannot be produced in support of the charges, when it is proved, that upon a search for his books of general business they cannot be found, the lease for a year of one estate being produced, and the draft of the release for the

whole, the number of the skins mentioned, and referred to, and this sort of transaction, which appears, and can only be, founded upon the execution of that deed, all these circumstances do not form evidence as strong as the charge of 6*s.* 8*d.* for attending the execution; which, if found in the attorney's book, it is admitted would do. My opinion is, that there is evidence enough of the contents of this instrument, if it existed; and farther, that the evidence [\* 144] sufficiently proves the fact, that it did exist. \*The enjoyment of Mr. Waring after the death of his wife might, it is true, be under some other title: but with so much evidence, as there is here, of a title, that would account for that enjoyment, I am not warranted to conclude, that it is to be accounted for with reference to some other title, which no fancy can suggest.

The Exception was accordingly over-ruled.

SEE, ante, the note to *Skipwith v. Shirley*, 11 V. 64, with the farther references there given.

### MILNER v. LORD HAREWOOD.

[1810, July 4, 6.]

DEMURRER allowed to a supplemental Bill; as stating circumstances, subsequent not only to the original Bill, but to publication; first, as not properly supplemental matter: secondly, as not material. If material, the benefit might be obtained in another shape: perhaps by a special application for the opportunity of examining witnesses, or a Bill of Discovery; as the object may be Discovery only, or also relief: and in that case that the Answer or Evidence may be read at the hearing (a).

THE supplemental Bill in this cause stated, that the Plaintiff Sir William Milner in Hilary Term, 1807, exhibited his original Bill against the Defendant; stating among other things, that by indentures of settlement, dated the 5th of January, 1746, previous to the marriage of Edwin Lascelles, afterwards Lord Harewood, and Elizabeth Dawes, it was agreed, that, when Elizabeth Dawes should attain the age of twenty-one, and have power so to do, the several lands and hereditaments, to which she was or should be entitled, should be settled and limited to the uses in the said settlement: viz. to the use of Edwin Lascelles for life; with remainder to trustees to secure a rent-charge to Elizabeth Dawes; remainder to the first and other sons of the marriage in tail-male: remainder to the daughters in tail general: remainder to the use of the survivor of Edwin Lascelles and Elizabeth Dawes, and the heirs of such survivor

[\* 145] \* The original Bill farther stated, that the marriage was

(a) Story, Pleading, § 337, 345, 616. In § 337, Mr. Justice Story states what he considers "the result of Lord Eldon's reasoning in this case, although the language is somewhat indeterminate."

had ; and Elizabeth Lascelles attained the age of twenty-one ; and indentures, dated the 22d and 23d of May, 1750, were executed for the purpose of carrying the settlement of 1746 into effect ; and it was agreed, that proper fines and other conveyances should be levied and executed for the purposes aforesaid ; that no fines were ever levied of the estates of Mrs. Lascelles ; and that Elizabeth Lascelles or Edwin Lascelles in her right continued seised during their joint lives ; that she died without issue ; and he survived her ; and continued in possession of the estate until his death in 1795 ; having surrendered old leases, and taken new leases of certain estates in the Bill mentioned ; that the Plaintiff is the heir-at-law of Elizabeth Lascelles ; and Edwin Lord Harewood became a trustee of the renewed leases for the Plaintiff's benefit ; and the Defendant, as heir-at-law of Lord Harewood, entered into possession : the Bill charging, that Elizabeth Lascelles was an infant at the date of the settlement in 1746, and a Feme Covert at the time of executing the deed of the 25th of October, 1750, declaring, that the fines, levied of the estates of Mr. Lascelles in Yorkshire, should enure to the uses of the settlement ; that she never levied any fine ; and therefore was not bound by the said deeds ; and the estates descended to the Plaintiff, as her heir-at-law ; and praying therefore an account of the rents and profits ; and that the Defendant may be declared a trustee, &c.

The Defendant by his Answer insisted, that he by the Will of Edwin Lord Harewood became entitled to the leasehold and other estates ; and that Edwin Lord Harewood was entitled thereto by the settlement of 1746 ; that Elizabeth Lascelles, after she came of age, acquiesced in such agreement ; and did certain acts to carry it into effect ; that he renewed the leases at his own expense ; \* and was from 1746 until his death, and the Defendant [\* 146] ever since, in the possession and enjoyment without interruption until the Bill filed ; insisting therefore upon such length of possession ; and that the heirs of Elizabeth Lascelles must be presumed to have abandoned and relinquished any right they had in the premises.

The Plaintiff by way of supplement showed, that the Defendant sold and surrendered to William Potter one undivided moiety of certain customary lands, called Netherlands, holden of the manor of Tollesbury Hall in Essex ; that Potter was admitted to him and his heirs ; and, the Defendant having sold and surrendered the other undivided moiety to Isaac Brightwen, he also was admitted to him and his heirs ; that afterwards Potter's moiety was surrendered by his son and heir to Brightwen ; and he was admitted to him and his heirs ; that all the said customary lands where part of the real estates of Elizabeth Lascelles ; and derived under the same title as the estates in the Bill mentioned ; and which copyhold estate the Plaintiff charges upon the death of Elizabeth Lascelles without issue descended to the Plaintiff, as her general and customary heir ; and he procured himself to be admitted as such heir to all the customary

lands, called Netherlands ; and brought an ejectment against Brightwen to recover the possession ; and in 1808 obtained a verdict and judgment (1).

The Bill by way of supplement farther stated, that the Defendant Lord Harewood caused the ejectment to be defended ; and since the verdict, with a view to confirm the title of Brightwen, contracted with the Plaintiff for the purchase of the said copyhold lands for 500*l.* ; which were accordingly conveyed in 1809 to the use of Brightwen and his heirs ; and the consideration paid by the Defendant.

[\* 147] \*The Plaintiff then stated, that the said copyhold lands depend upon the same title, and were derived to the Plaintiff in the same way, as the leasehold estates in the original Bill mentioned ; and the Defendant pretends, that it ought to be presumed at this distance of time, that Elizabeth Lascelles, after she attained her full age, executed some release of the estates in the Bill mentioned ; charging the contrary of such presumption ; and that the recovery of the said copyhold lands, so acquiesced in by the Defendant, completely negatives the existence of such release ; and rebuts the presumption, that any such release ever did exist : otherwise the Plaintiff could not have recovered in such action. The Bill therefore prayed a discovery ; and that the supplemental matter may come on to be heard at the same time with the original Bill ; and that the Plaintiff may have the full benefit thereof.

To this Bill the Defendant put in a general demurrer to the discovery and relief.

Mr. Hart and Mr. Bell, in support of the Demurrer. Sir Samuel Romilly and Mr. Trower, for the Plaintiff.—Two grounds of objection were taken : first that the circumstances, represented to have occurred, not only after the original Bill was filed, but also after replication and publication in the original cause, were not properly supplemental matter : secondly, that if they might be given in evidence, though subsequent to the original Bill, they were not material.

The Lord CHANCELLOR [ELDON].—This is a case of the first impression. Suppose, after a Bill filed the Plaintiff and Defendant met ; and the Defendant expressly stated circumstances, [\* 148] as facts ; or that \*the Plaintiff had such a title ; and that no other person was present : though that happened after the Bill filed, there must be some mode of establishing the fact ; and liberty to file a Bill of Discovery ; with a view to obtain an admission from the Defendant. Suppose, a witness had been present ; and the Defendant by Answer denies the conversation : the Plaintiff must in some way have the benefit of that evidence : yet I do not recollect an instance, where the discovery of a circumstance, that took place after the replication, as in this case, was con-

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(1) Doe on the demise of *Milner v. Brightwen*, 10 East, 583.

sidered so material as to furnish any information with regard to the mode of obtaining that benefit.

1810, July 6. The Lord CHANCELLOR [ELDON].—There is no recollection of a supplemental Bill of this kind; and, if a new practice is to be settled, the strong inclination of my opinion is, that, when the particular case arises, where either conversation or admission of the Defendant, becomes material after answer, or replication, or, as in this instance, after examination of witnesses, in the original cause, or, if a new fact happens after publication, which it is material to have before the Court in evidence, when the original cause is heard, it is much better, that the examination of witnesses, if required, should be obtained upon a special application for the opportunity of examining, and that the depositions may be read at the hearing: or, if discovery is required, that the party should file a Bill for that purpose merely (1); and, if relief is required, that the Answer, comprehending the discovery, should be read at the hearing of the original cause.

If however this Bill, praying the benefit of this supplemental matter, is to be considered regular, the other ground, upon \* which it is resisted, appears to me tenable: viz. that this [\* 149] matter cannot upon just reasoning be represented as material, and beneficial; and the demurrer may therefore upon that ground be supported. Upon the form of the supplemental Bill and the nature of the reference to the Answer to the original Bill, I must look at the original Bill and the Answer. The Bill states the title of Miss Dawes, afterwards Mrs. Lascelles, to several estates, freehold, copyhold, and on leases for lives, vested in certain persons in trust for her either in possession or reversion. By the marriage settlement in 1746 it was agreed, that, as soon as she should attain the age of twenty-one, and have power so to do, the several lands, to which she was, or should be, entitled, should be settled. Nothing is stated by the Bill as to the copyhold estates, showing, that at law the title to those estates would not descend to her heirs at law: as to the leasehold estates neither she, nor her heirs, could upon this representation have the legal estate in them, though they would, as *cestuis que trust*, be entitled; unless barred by the facts, that occurred since the year 1746, from contending, that the equitable interest was in them. One very material transaction occurred in 1754; when upon a Petition by Mr. and Mrs. Lascelles, as the lessees of some of the premises, Lord Hardwicke made an Order, without examining Mrs. Lascelles, that the infant trustee should convey that leasehold estate to the uses of the settlement. The title as to the leasehold estates stands thus: that the person who is the heir at law of Mrs. Lascelles, is entitled to come into equity; praying, that a trust may be declared for him.

The question then upon the supplemental Bill, if regular, is,

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(1) *Usborne v. Baker*, 2 Madd. 379.

whether the proceedings and recovery in ejectment stated would be circumstances of evidence, material and useful to the Plaintiff [\* 150] for the purpose of repelling \*the defence, set up to this Bill: the Plaintiff contending that the facts represented in the supplemental Bill to have happened after publication in the original cause, would be material and useful in evidence upon the hearing of the original cause. The Answer of Lord Harewood is, that with regard to the leasehold estates, attending to the effect of the settlement, the fines of the freehold estates, and acts done as to the leasehold estates, without calling the attention of the Court to any thing, done as to the copyholds, a Court of Equity ought not to give relief; and this equity ought to be considered as abandoned and relinquished: Mrs. Lascelles having confirmed the agreement; and those, who came after her, not having set up the equity, until this Bill was filed. My opinion is on both grounds; that, if these facts are material and beneficial, that benefit must be had in another form; and secondly, that the facts themselves are not material and beneficial; and therefore this Demurrer ought to be allowed (1).

[This note refers also to S. C., 18 V. 259.]

1. Events relevant to the subject of dispute may have occurred subsequently to the filing of the bill, which events it may be proper to bring before the court; but it does not follow, that a supplemental bill will be the proper mode of effecting this: where there is no alteration in the interest of the parties, nor any particular circumstance requiring farther discovery, and the relief is not varied by the subsequent matter, but the plaintiff might have all the relief to which he is entitled, under the original bill, a supplemental bill is improper: *Adams v. Dowding*, 2 Mad. 59; for, if all relevant facts occurring between the bill and answer were necessarily to be stated by supplemental bill, that might occasion bills without end: *Knight v. Matthews*, 1 Mad. 573. A supplemental bill of discovery may, however, be filed, wherever a discovery is necessary, and it cannot be obtained by amendment of the original bill (*Usborne v. Baker*, 2 Mad. 387), or where, as intimated in the principal case, the object cannot be answered by an order for the examination of witnesses, and that their depositions may be read at the hearing.

2. As to the doctrines respecting estates *per autre vic*, and the legislative enactments on that head, see, *ante*, note 3 to *Watkins v. Lea*, 6 V. 633; and notes 4, 5, to *Ripley v. Waterworth*, 7 V. 425.

3. There are cases in which a guardian will be protected, though he has acted without authority, if the act done appears to be what the court would have ordered: see note 1 to *Davies v. Austin*, 1 V. 247.

4. With respect to the operation of a recital in an instrument, see notes 4, 5, to *Dundas v. Dutens*, 1 V. 196; and the note to *Skipworth v. Shirley*, 11 V. 64.

5. As to the effect of contracts by infants, upon the consideration of marriage, with reference to their real estates, see note 1 to *Johnson v. Boyfield*, 1 V. 315.

6. That it is impossible to lay down, beforehand, all the various modes by which a party may be fairly held to have made a conclusive election between two conflicting claims, see the note to *Butricke v. Broadhurst*, 1 V. 171; and, as to the election of a *feme covert*, see note 1 to *Lady Cavan v. Pulteney*, 2 V. 544.

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(1) *Adams v. Dowding*, 2 Madd. 53.

## DELAPOLE v. DELAPOLE.

[ROLLS.—1810, JULY 14.]

**DEVISE** in strict settlement, with a clause of forfeiture by cutting any trees. Upon a Bill by the infant remainder-man in tail an inquiry was directed, whether any trees, in the park, not ornamental, or affording shelter to the mansion-house, are proper to be felled; and whether it would be for the benefit of all parties interested, that they should be felled, and sold; and the money laid out in other estates, to be settled to the same uses.

SIR WILLIAM DELAPOLE by his Will devised all his freehold estates, subject to a trust term, to the use of his eldest son William Templer Delapole and \*his assigns for life; with [\* 151] remainder to trustees to preserve contingent remainders: remainder to his first and every other son successively in tail male; with remainders over; and the ultimate remainder to his own right heirs.

The Will contained a proviso, that in case the person or persons, who by virtue of the limitations and devises therein contained should be entitled to the manors, &c. when and as they respectively should become entitled in possession, should reduce the number of deer in Shute Park to less than ten, or should disspark the same, or should cut down any trees therein, then and in such case the estate and interest of such person or persons in the estates devised should cease, as if such person was dead.

The Testator died in 1799.

The Bill was filed on behalf of George Delapole, the infant son of William Templer Delapole, against his father; praying a reference to inquire, whether any and which, or how many, of the trees in Shute Park, and which are not ornamental, and do not afford shelter or protection to the mansion-house, are proper to be felled; and whether it will be for the benefit of the Plaintiff and the other persons interested in the estates, that such trees should be felled; and sold; and the money laid out in the purchase of other estates, to be settled to the same uses; and, in case the Master shall be of that opinion, that a Decree may be made accordingly.

The Answer admitted, that the park contains one hundred acres; that there are a number of timber trees; many of which have been for several years of sufficient age and growth to be felled: and are and have been for a long time in a state of decay; and, if not soon felled, will be of very little value; stating that they are at a considerable distance from the house; and do not afford shelter \*or ornament to the house; that it will greatly tend to [\* 152] the interest of all parties; and therefore the Defendant did not object.

Sir *Samuel Romilly* and Mr. *Johnson*, for the Plaintiff, only prayed an Inquiry; observing, that the Plaintiff, if adult, might consent to waive the forfeiture; and the Court, seeing distinctly the great prejudice to all parties, would not follow the intention, as declared;

admitting, that trees ornamental in any way, though not strictly within the principle of equitable waste, planted or growing for ornament (1), ought to be protected.

Mr. *Leach*, for the Defendant, submitted the question to the Court; requiring only, that the money should be laid out in land, to be settled to the same uses (2).

The MASTER OF THE ROLLS [Sir WILLIAM GRANT] directed a reference accordingly.

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As to the doctrine of what is termed "equitable" waste, see note 4 to *Pigott v. Bullock*, 1 V. 479.

(1) See *Day v. Merry, ante*, vol. xvi. 375, and the references in the notes, 376; vi. 110.

(2) *Powlett v. The Duchess of Bolton, ante*, vol. iii. 374; *Wickham v. Wickham, post*, xix. 419; Coop. 288.

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## M'LEOD v. DRUMMOND.

[1810, MAY 19, 21; JULY 23.—ANTE, VOL. XIV. 353.]

**PLEDGE** by executors of Bonds to the Testator upon advances from time to time for several years. Decree at the Rolls, dismissing a Bill, not by creditors or legatees, but by co-executors, who had not previously acted, affirmed by the Lord Chancellor on appeal (a).

Generally, a purchaser from an Executor not bound by his misapplication of the money: nor in many cases even of pledge, if free from fraud, or direct evidence on the face of the transaction of an intended misapplication (b), [p. 154.]

Upon a Deposit by Executors of the Testator's property with their own for their own debt the latter to be first applied, [p. 158.]

Effect of length of time against a demand in respect of misapplication of assets by the Executor, [p. 165.]

Distinction between directing an Instrument to be delivered up and making it effectual in Equity, [p. 167.]

Security by Executor upon the assets for his own debt and future advances, with other circumstances, proving the act not to be consistent with the duty of Executor, but for his own advantage, cannot be held, [p. 168.]

Testator's effects cannot be taken in execution for the Executor's debt, [p. 168.]

Right of pecuniary or residuary legatee to follow the assets in case of misapplication, where a creditor or specific legatee could, [p. 169.]

Lien of residuary legatee on the specific fund, [p. 169.]

Pledge of the assets by an Executor cannot be held, even against a pecuniary or residuary Legatee, and though for money advanced at the time, if under circumstances, showing knowledge of an intended application, not conformable to, or connected with, the character of Executor, [p. 170.]

Distinction between an antecedent debt and a present advance, as the consideration, not conclusive (c), [p. 170.]

THE Plaintiff appealed from the Decree at the Rolls, dismissing the Bill (1).

\* Sir *Samuel Romilly*, Mr. *Fonblanque*, and Mr. *Cooke*, [\* 153] for the Appellants.—Mr. *Richards*, Mr. *Hart*, and Mr.

*Dowdeswell*, in support of the Decree.—In support of the Appeal it was contended, that the length of time, which had elapsed since the testator's death, excluded the supposition of an intention to apply the money to the purposes of the Will: that *Nugent v. Gifford* (2),

(a) On the subject of the transfer of assets by executors, see *ante*, note (a) *Hill v. Simpeon*, 7 V. 152; 1 Story, Eq. Jur. § 422, 423, 424; 2 Williams, Exec. 671, and notes, 674; 3 Sugden, Vend. & Purch. (6th Am. ed.) ch. 17, § 2, p. [176, 177], 112; *Allenden v. Ritson*, 2 Gill & J. 86; *Andrew v. Wrigley*, 4 Bro. C. C. (Am. ed. 1844,) 125-138, notes; *Ram on Assets*, 491, 492; note (a) *Dickenson v. Lockyer*, 4 V. 36.

As to an agent pledging goods of his principal for his own debts, see note (a) *De Bouchart v. Goldsmid*, 5 V. 211.

(b) It is only in cases of fraud and collusion, that the Court will follow assets in the hands of a purchaser; *Field v. Schiefflin*, 7 Johns. Ch. 155, 156; 1 Story, Eq. Jur. § 580; 2 ib. § 1128; 2 Williams, Exec. 673, 674; *ante*, note (a) *Hill v. Simpeon*, 7 V. 152; note (a) *Dickenson v. Lockyer*, 4 V. 36.

(c) There is a decisive difference between taking assets for an antecedent debt and for money advanced at the time of the transfer; *Petrie v. Clark*, 11 S. & R. 398; *Field v. Schiefflin*, 7 Johns. Ch. 159.

(1) Reported *ante*, vol. xiv. 353; see the note, v. 213.

(2) 1 Atk. 463; cited 2 Ves. 269. Stated from the Register's Book, 4 Bro. C. 136.

and *Mead v. Lord Orrery* (1), being cases of residuary legatees, as well as executors, have no application to this: a deposit by two executors merely, the others not having renounced, of the testator's property, mixed with other funds; and not in their character of executors; but as army agents: a clear application for their own purposes, not those of the testator; and the knowledge of that purpose gives a right to follow the property.

The Lord CHANCELLOR [ELDON].—This case appears to have been considered with great attention by the Master of the Rolls; who after two arguments pronounced the judgment with a strong conviction, that it was right. That circumstance alone would from the deference, that I know to be due to his judicial opinions, induce me to look through the authorities with great care: a duty which is more incumbent on me; as I am not able to reconcile the cases, as they have been stated at the Bar.

There is no doubt, that the power of an executor over the property he takes from the testator is very large both at law and [\* 154] in equity: but that is for the purpose of \*enabling him to execute his trust, and to prevent the general inconvenience of implicating and entangling third persons in inquiries as to the application he may propose to make of the money, produced by the conversion of the assets. If therefore the transaction is no more than a sale of part of the assets for money, advanced at the time, the vendee can never be affected by proving the executor's intention at the time to misapply the produce; or, if he had it not originally, that, afterwards taking up that intention, he did actually misapply the produce. A third person, if there is no more in the transaction, would be fully justified in assuming, that the sale was for those purposes, for which the law gives an executor the power of sale. In a great variety of cases also an executor must be taken, at the hazard, not of the person, dealing with him, but of the *Cestui que trust*, to be entitled even to pledge the assets. The true question is this: whether there must be, what some of the cases import, fraud and circumvention by the person dealing with the executor for his own benefit; or, on the other hand, if there is direct evidence, that the executor is going to misapply the produce, whether the other party can safely deal with him.

The doctrine, stated in the case of *Whale v. Booth* (2), goes a length, to which I certainly am not prepared to follow even Lord Mansfield. That was the case of executors indebted; and the creditor, in order to obtain satisfaction of his debt, took in execution *Bona propria*, and also *Bona testatoris*, known to him to be such. Lord Mansfield puts the validity of the execution, not upon the legal property of the executors, but upon the executors' joining in the bill of sale; and says, that such is the power of an executor, [\* 155] that, though it is apparent \*on the face of the transaction,

(1) 3 Atk. 235.

(2) 4 Term Rep. 625, n. (a).

that he is about to apply the assets to a purpose, foreign to the Will, yet a person with that knowledge is justified in dealing with him upon the supposition, that all the debts are paid ; or, that the testator was, or might be, indebted to the executor in that amount.

If a person, dealing with an executor, is safe on that ground, as it is possible that in the arrangement of all the affairs the debts may be paid, or the testator may be indebted to the executor, how can the question upon the executor's right to assign or pledge the assets arise ? The person, dealing with him, must be safe in every case. The decisions of Lord Thurlow and the Master of the Rolls are not consistent with that. The distinction between an application of the assets to the satisfaction of an antecedent private debt of the executor, and a pledge or assignment upon an advance at the time, appeared to them essential : both inclining to the opinion, that in the former case the assignment or pledge would be considered as made with a view, and for a purpose, not connected with the administration of assets ; but money, advanced at the time, may be, and, I admit, is *prima facie*, but no farther, to be considered as advanced for the purpose of paying the debts.

Admitting that distinction, the question must be whether there is not in the transaction strong and pregnant evidence, that it is, not what *prima facie* it is to be considered, an advance for the debts, but for a different purpose. Suppose, other persons, not Ross and Ogilvie, had been the executors ; and had applied to the bankers to give Ross and Ogilvie credit for 5000*l.* in account ; offering bonds, the testator's property : the construction according to Lord Mansfield's opinion must be, that the transaction is right ; as Ross and Ogilvie must be \*understood to have lent, or [\* 156] engaged to lend, the executors 5000*l.*; which sum must be supposed to have been applied for the purposes of the Will ; and the executors must therefore have a right to pledge the assets, not for any apparent purpose of the Will, or for payment of the debts ; but for the discharge of that sum, which those, who lent it, were authorized to suppose was so advanced, and applied. If the Court is thus to strain in favor of persons receiving the testator's property, known to be such, and at the moment not transferred for the purpose of administration, through every argument, that ingenuity, unsupported by any fact, can supply for their safety, the effect must be, that the question cannot arise.

This case however goes farther. This is a deposit, not merely of the testator's property, but upon a credit, given to the account of Ross and Ogilvie, who happen to be executors, not as executors ; a credit, which could not by possibility almost be given to them in that character ; depositing, not the testator's property only, but at the same time a great variety of valuable subjects, their own property ; a deposit, apparently for their own credit, together with their own property, of this property ; which ought not to be the subject of deposit for their own debt. Still upon Lord Mansfield's principle, that for

the safety of the party these inferences are to be drawn, it may be contended, that the executors, having paid debts, may have a right to raise money upon the assets; and the addition of their own property, as a farther deposit, cannot affect their right. The true question however is, whether if in the instance of a plain sale, or a pledge, the party advancing the money is safe by the effect of the inference, and, to fix him, you must show, that the transaction is not what it appears to be, it must not on the other hand be taken to be, if it appears to be, an application of the assets for the private purposes of <sup>[\* 157]</sup> the executors, with the knowledge of the party dealing with them, unless upon inquiry circumstances appear, showing, that the transaction really is not what *prima facie* it is.

Upon these views this is a case of extreme importance. I must take great care, on the one hand, not to cramp the power of executors; but, on the other, if that principle is to go the length of permitting them to pledge the assets to every banker, or every man, who will take them, apparently for their own purposes, the effect of such a rule must be, that they may do what they please. Attending to the authorities upon this subject, the great names of those, by whom they were delivered, and the difficulty of reconciling them, as they are stated, I must particularly examine the circumstances of this case, and the reports of the others, to which I have alluded.

1810, July 23d. The Lord CHANCELLOR [ELDON].—The Plaintiffs in this cause represent themselves as executors merely; not stating any express trust, upon which they held the personal estate of the testator. The assignees of the bankrupts are not before the Court. The money transactions of the bankrupts with the Defendants were not in the character of executors, but as carrying on the business of army agency in partnership. The Bill alleges, that the Defendants knew, that the bonds were part of the testator's estate at the time they took them as securities for money, lent to the bankrupts for their own use; representing, that the Plaintiffs from the inconvenience of their residence in Scotland, and their great personal confidence in the bankrupts, had omitted to obtain probate. The trusts of the Will, and the parties interested under them, are not stated.

<sup>[\* 158]</sup> \* The Answer of the Bankers represents generally a variety of dealings between them and Ross and Ogilvie; the latter depositing from time to time securities of their own: those deposits being delivered up, as the sums borrowed were paid off: upon subsequent loans from time to time the same securities being again pledged; and neither from the answer, or the more authentic detail of facts in the Master's Report, can I collect, what is the state of the account, in respect of which these deposits were made. The deposits were to be applied in account to the discharge of the very sums, advanced on their credit. If the sums, in respect of which the deposits were made, have been paid, or partly paid, to that ex-

tent there is an end of the deposit. The fact, if doubtful, ought to be ascertained ; and, the deposit in one or two instances consisting of the testator's property with their own, if the whole deposit was of greater value than the debt, in respect of which it was made, an equity arises, under which, those, who are entitled to the testator's estate may effectually contend, that his estate, if bound by the deposit, should be relieved by the previous application of the property of Ross and Ogilvie, deposited at the same time.

The Answer of the bankrupts states the material circumstances, that they were the only acting executors ; and as such kept the accounts between themselves and the estate ; that they were frequently in advance for the estate ; and had therefore made repeated deposits of the testator's property in the way, that has given rise to this cause.

If there is any ground for supposing, that the Defendants have not now the same demand subsisting as at the period of the advances, that by the effect of subsequent accounts and dealings the transaction does not stand \* under circumstances [\* 159] precisely the same as at the time of the deposit, some inquiry might be proper : with the view to ascertain, whether the property deposited is still liable to be held ; on the ground, that the very sums, in respect of which the deposit was made, or part of them, are still due ; and, if the value of the deposit, combined of the property of Ross and Ogilvie and of the testator's estate, would over-pay the sum, for which it was made, to determine, whether, admitting the testator's estate to be bound by the act of the executors, those, who are entitled under the Will, have not an equity to insist upon the application of the property of the executors in the first instance.

Upon the face of the memorandum, indorsed upon the bond in 1796, it was part of the testator's personal estate : that memorandum importing that it would require an assignment from them, as executors ; but also engaging to assign it, as from themselves ; consistent therefore with the supposition, that they had in some way acquired the equitable interest in it. One circumstance has great weight with me ; that this is not a case of executors, applying, with the testator's property in their hands, and raising money upon a deposit or a sale of that property ; in which case it may be said, public convenience requires, that they should be supposed to receive it for the purpose, to which they ought to apply it : but two individuals, each happening to be an executor, but also carrying on a business in London under the known firm of Ross and Ogilvie, apply to these bankers for money ; not to be in their hands probably or by intention for the uses of the Will ; neither of them appearing to be dealing as executors ; but, having in their business as army agents an account with the bankers, they deposit the securities of the testator for the purpose of procuring credit to themselves in that concern, which \* they carried on, and enabling themselves [\* 160] to continue their transactions in that character with those bankers.

It may be useful on this occasion to advert to the most material cases upon this subject: not only as a collection of authority, to which we may resort, but also as it will enable us justly to appreciate the value of several general propositions, which appear laid down in most unqualified terms, as to the power of executors in law and equity over the assets; and to ascertain, whether those general doctrines are as true, as they are generally expressed, whether in the Equity Reports, or in two principal cases in the Court of King's Bench: *Whale v. Booth* (1), and *Farr v. Newman* (2). The first very material case, *Humble v. Bill* (3), was decided in this Court: but the Decree, establishing the mortgage made by the executor, was reversed in the House of Lords; and that reversal, as far as it can be supposed to furnish doctrine upon the subject, by no means supports the doctrine as to the power of executors to the extent, in which it is expressed in text writers, and in some of the cases decided. The term, part of the testator's estate, was not specifically disposed of: but he charged it with 2000*l.* for his daughter and her children. The Bill by the assignee of the mortgage was resisted upon the general reasoning, that there was no occasion to sell for payment of debts; and the Plaintiff had notice of the Will: but the mortgage was established by the Decree of this Court on the ground of the danger of interfering with the power of executors over the assets; the Court observing, that if the executor sold in prejudice of a residuary or specific legatee, he might have his remedy [\* 161] against the executor: \* but could not follow the estate into the hands of a purchaser: the Court appearing to conceive, that there was not any difference between a residuary or specific legatee; and it has been held of late of no consequence with reference to the power of executors, whether the personal estate is bequeathed upon a trust, or not.

The observation, falling from the Court in the case of *Crane v. Drake* (4), shows, that the reversal of that Decree was not considered satisfactory; and Sir Joseph Jekyll in *Ewer v. Corbet* (5), and Lord Alvanley in *Andrew v. Wrigley* (6), express their dissatisfaction with it: but in *Mead v. Lord Orrery* (7) Lord Hardwicke is represented to have said, with reference to the reversal of the Decree in *Humble v. Bill*, that "it would have been going a great way to say, that making a subsequent mortgage should prevail against a prior mortgagee; and, as being a charge upon the profits of a printing-office, it might besides produce enough in time to pay both." To what circumstances Lord Hardwicke was then adverting I cannot collect; and I do not think the first part of that passage accurate;

(1) Mich. T. 25 Geo. III. 4 Term Rep. 625, n.

(2) 4 Term Rep. 621.

(3) 2 Vern. 444; 1 Bro. P. C. 71.

(4) 2 Vern. 616.

(5) 2 P. Will. 148.

(6) 4 Bro. C. C. 125; see 137.

(7) 3 Atk. 235; see 241.

not giving a true state of the case, nor consistent with his own previous statement of it. This case is rather an authority for the opinion Lord Kenyon seems to have held, that a trust with regard to personal property may be so created, that a purchaser would be bound to see to the application of the money, than for some intermediate opinions between that date and this time.

In the next case, *Crane v. Drake* (1), it is stated, that the Defendant had notice of the Plaintiff's debt : a \*circumstance which has been considered most material ; and in the subsequent case, *Mead v. Lord Orrery*, Lord Hardwicke states (2) from the Register's Book, that the Decree in *Crane v. Drake* proceeded upon the notice of the Plaintiff's debt and the evidence in the cause ; and in Viner (3) Lord Hardwicke is stated to have said, that the Decree was founded upon particular proof of fraud ; which Vernon does not set forth. A very important observation upon that case was made by Lord Alvanley (4), so just that it is not easy to withhold our assent : viz. "Can there be a stronger case of a *devastavit* than an executor aliening the property of his testator to pay his own debts :" the alienee knowing at the time, that debts of the testator were due ?

The anonymous case, cited in *Pagett v. Hoskins* (5), is not the case of a residuary legatee : a circumstance, in some subsequent cases held to be of considerable weight. In *Ever v. Corbet* (6), the case of a specific bequest of a term, Sir Joseph Jekyll carefully abstained from stating, what would be the effect of notice of the Will, if there were no debts ; and the purchaser knew that ; or that all the debts were paid. *Burling v Stonard* (7) contains similar doctrine. The case of *Elliot v. Merriman* (8) is very important in itself ; and as in *Bonny v. Ridgard* (9) Lord Kenyon said, he took it as his text. The principle is there stated ; and the reason of it ; and in Barnardiston's Report it is said, that personal estate may be clothed with such a particular trust, that the Court might require a purchaser to see the \*money properly applied. Lord Kenyon [\* 163] agrees with the principle of Sir Thomas Sewell ; which it is very difficult to reconcile with *Nugent v. Gifford* and *Mead v. Lord Orrery* ; and would have acceded to that doctrine, if length of time and the other circumstances had not barred the relief, that might have been had against the purchaser.

In *Nugent v. Gifford* (10), as it appears in Atkyns, Arundel was

(1) 2 Vern. 616.

(2) 3 Atk. 240.

(3) 18 Vin. 121.

(4) 4 Bro. C. C. 137, in *Andrew v. Wrigley*.

(5) Pre. Ch. 431.

(6) 2 P. Will. 148.

(7) 2 P. Will. 149.

(8) 2 Atk. 41 ; 3 Barnard, 78.

(9) At the Rolls, 3d December, 1784 ; 1 Cox, 145 ; cited 2 Bro. C. C. 438, in *Scott v. Tyler* ; and 4 Bro. C. C. 138.

(10) 1 Atk. 463 ; cited 2 Ves. 269.

the executor : but there was also another material circumstance ; that he was the sole residuary legatee (1). The interest of the testator in the term was only an equitable interest. It is certainly true, as there laid down, that a creditor has no lien upon the assets : but, whether it is clear, that, after all the debts have been paid, the residuary legatee, who can call for a transfer in equity, has not a lien, is a different consideration. The universal language is, that after debts paid the assets are the executor's own ; which may, or may not, be : but, if, as the legal property is in the executor, the equity of the residuary legatee is not to be noticed, those expressions must be taken with some allowance. The general exception of fraud receives a construction from the reasoning, that follows ; excluding the case of a purchaser ; who, knowing there are debts, does not place any thing in the hands of the executor, as an equivalent, to make up the assets : or, if any thing does pass to the executor, it is received with the intention of both parties, that it shall not be applied as assets. Lord Hardwicke observes, that in *Crane v. Drake* there was express notice of the Plaintiff's debt ; and in the case before him there [\* 164] was no notice of any debts due from the \* testator. That case therefore was decided, not upon such general doctrine as we find, relating to this subject, but on these circumstances ; that the executor, being also residuary legatee, sold the term to an individual, having no notice, that there was any debt ; who therefore might reasonably conceive, that the fund was his to dispose of. The only substantial ground of distinction from the consideration being an antecedent debt is as evidence, that it is not for the purposes of the Will. If Lord Hardwicke conceived himself to have decided these cases upon general principles, he appears in *Taner v. Ivie* (2) so much startled by the consequences as to wish to retract ; putting them entirely upon the circumstances.

The case of *Mead v. Lord Orrery* (3) has very particular circumstances, and much general doctrine : it is evident however from *Taner v. Ivie* (4) that Lord Hardwicke had not made up his mind, that this was to depend upon general doctrine. The date of the transaction is very material. The assignment of the mortgage was in 1726, fourteen years after the testator's death ; and Lord Hardwicke relies upon the circumstance, that the executor was one of the residuary legatees ; as in *Nugent v. Gifford* he was the sole residuary legatee. Abstracted from those circumstances, that the executor was one of the residuary legatees, that the transaction was fourteen years after the residue would in the ordinary course have been divided, and that the other executors represented, that the money, due on the mortgage, was the proper money of the co-executor, I agree with Lord Kenyon, that it is very doubtful, whether such a

(1) This appears, not in the Report in Atkyns, but in the statement, 4 Bro. C.C. 136.

(2) 2 Ves. 466 ; see 469.

(3) 3 Atk. 235.

(4) 2 Ves. 466.

transaction, devoting what upon the face of it was, and must have been known to be, the testator's property, to the purpose \* of giving security for an individual, with reference to his [\* 165] execution of the office of receiver, would in this Court be permitted to stand.

The next case is *Bonney v. Ridgard* (1); and it is impossible to deny, that Sir Thomas Sewell in effect, and Lord Kenyon in terms, shook the authority of *Nugent v. Gifford* and *Mead v. Lord Orrey*; if those cases are supposed to establish doctrine so general as some of the *dicta* upon this subject import. Lord Kenyon seems to accede to the propositions, stated in *Elliot v. Merriman* (2); but also thought, that, though creditors might follow the assets (not finding it necessary to consider the case of legatees, and the distinctions between pecuniary, specific, and residuary legatees) there were strong circumstances of evidence, that no fraud was intended; and, though it was not easy to conclude, that the transaction was right, yet length of time and acquiescence would be an answer to a demand, to which, if made at an earlier period, no answer could have been given; and upon the length of time alone he so decided.

Upon the case of *Whale v. Booth* (3), as a decision in a Court of Law, I do not presume to make any observation. The proposition, stated in the judgment, may be understood as general doctrine: but I cannot admit, that there is no exception either in law or equity. Lord Mansfield states, that an execution, permitted by the executors for payment of their own debt, is equal to a purchase; and the same as an alienation by the executors: but it remains to be considered, whether these general propositions are borne out by the authorities in \*Equity: for instance, that in a [\* 166] particular case a residuary legatee, being also executor, disposes of the assets in discharge of his own debt to a man, having no notice of debts unpaid: whether that is more than general doctrine, founded on the particular circumstances of each case.

With regard to the case of *Scott v. Tyler* (4) I can confirm the assertion, that the judgment, stated by Mr. Dickens, contains Lord Thurlow's opinion, intended to have been delivered as his judgment, if a compromise had not taken place. The question (5) would have been more accurately expressed by stating, that the bonds were pledged by the executrix to secure, not only a private debt of her own, but also future advances, to be made to her, not as executrix, but in her private trade: and, if an executor cannot deposite securities for future advances, to be made to him, not in his character of executor, but as a trader, it is difficult to hold, that he may make the deposite for present advances, not as executor, but as a customer of that bank in his own individual trade. Lord Thurlow pro-

(1) Stated 4 Bro. C. C. 130, 138; see also 2 Bro. C. C. 438.

(2) 2 Atk. 41.

(3) 4 Term Rep. 625, note (a).

(4) 2 Bro. C. C. 431; 2 Dick. 712.

(5) 2 Dick. 724.

ceeds to state, that the ground must be a fraud in the bankers,concerting with the executrix a *devastavit*; and misapplication of that part of the testator's effects, to disappoint the specific legatee; and observes, that it is of great consequence that no rules should be laid down here, which may impede executors in their administration; or render their disposition of the effects unsafe, or uncertain to the purchaser; that his title is complete by sale and delivery; what becomes of the price is no concern of his; and this observation applies equally to mortgages and pledges; even to the present instance: where assignable bonds were \*pledged without assignment; also, where the transaction is with one of many executors; for each is competent.

[\* 167] These passages imply, that upon the pledge of a bond, an assignable *chose in action*, by one executor, the Court must have found the means of making it effectual against all; if there was no fraud: but there is a great difference between directing an instrument to be delivered up, where upon the circumstances, under which it was deposited, that would be too much, and in equity calling upon that person and others to make it effectual. In the case before me the Court is required to order these bonds to be delivered up.

Lord Thurlow then proceeds to state the effect of fraud; that, if one concert with an executor, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or *in any other manner* (very material words) contrary to the duty of the office of executor, such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value; and on both grounds the Defendants must deliver up the bonds; and account for the interest, received upon them.

Another ground is then stated, which perhaps upon the decisions it would be difficult to maintain; except as Lord Kenyon introduced it; that the bonds, as a specific legacy, were legally vested in the executors, as trustees for the Plaintiffs; and the possession of the Hankeys without assignment gave them but a posterior equity; admitting however, that, though that equity was posterior, if the executors had dealt not contrary to their duty, the Court would [\* 168] not disturb the pledge; not deciding \*whether it should be aided. The conclusion from that judgment, unless a distinction prevails between pecuniary, specific, and residuary, legatees, is, that the security cannot be held, where the person, dealing with the executor, knows, the subject is the property of the testator; as those parties must have known the bonds to be; kept as the testator's property; not converted for three years; not made the subject of distribution; not handed over in payment of debts; nor taken by the executor upon any statement of his own account; which might have given him a demand to that amount upon the assets; but, where it appeared to be the property of the testator, unaffected as such for three years; handed over as security for a debt;

an act clearly not consistent with the duty of the executors: and also in prospect of future advances; with regard to which, if they could be made under such circumstances as would afford a presumption of an intention to apply the money to the debts, or to the farther objects of the Will, yet, as to those future advances, to be made, not in a manner conformable to the duty of the executrix, but for her private advantage in her trade.

After this another extremely material case occurred: *Farr v. Newman* (1); upon which the Judges differed. Mr. Justice Grose in his judgment states the general propositions, I have noticed, as generally as they are stated any where; considering that case as reversing, or going a great way towards reversing, *Whale v. Booth* (2). It gives me great satisfaction, that the majority of the Court decided against the opinion of Mr. Justice Buller, that the effects of the testator might be taken in execution for the debt of the executor (3): a proposition, which, \* particularly with reference to [\* 169] the arguments, by which it was maintained, appears to me to go this length; that he, who comes first, must be first served. What, I ask, would be the case of a creditor, who had used all the diligence he could? a creditor of the executor, having got judgment in the term before the testator's death, might according to that opinion execute that judgment upon the effects of the testator, as well as the executor, long before any creditor of the testator could by possibility get judgment. Mr. Justice Ashhurst found a difficulty in giving up the case of *Whale v. Booth*; and Lord Kenyon appears to me to carry the doctrine to a much greater extent than his own decisions in this Court will authorize. Even that case of *Farr v. Newman* may, I apprehend, without some comment upon the propositions it contains, lead executors into danger.

The last case, *Hill v. Simpson* (4), is also very material; on which the Master of the Rolls observes (5), justly, that for the first time he was of opinion, that a general pecuniary legatee had a right in equity to follow the assets: Lord Hardwicke having frequently considered it as doubtful, whether even in the excepted cases any one except a creditor, or a specific legatee, could follow them. I concur in the principle, laid down by the Master of the Rolls; and cannot conceive, why in a case, falling within the exception, a creditor and a specific legatee should be able to follow the assets; and not a pecuniary or residuary legatee. The case of a residuary legatee is stronger than that of a pecuniary legatee. It is said in *Farr v. Newman*, that the residuary legatee is to take the money, when made up: but I say, he has in a sense a lien upon the fund, as it is; and may come here for the specific fund. If it is wrong, as as againt a \* creditor, for the executor to apply the fund [\* 170]

(1) 4 Term. Rep. 621.

(2) 4 Term. Rep. 625, note (a).

(3) For the effect of time upon this question, see *Ray v. Ray*, Coop. 264.

(4) *Ante*, vol. vii. 152.

(5) *Ante*, vol. xiv. 354.

in payment of his own debt, why is it not equally wrong, both in Law and Equity, to allow a third person wilfully and fraudulently to take from the executor that money, which in his hands the residuary legatee can call for, as the specific property of the testator?

Then came this case, now before me on Appeal. It seems to have been considered sufficient to establish, that the transfer was not a pledge for an antecedent debt. I cannot hold, that it is competent to an executor, even against a pecuniary or residuary legatee, to go to a banker immediately after the testator's death; and to pledge the property of the testator in consideration of a loan, to be then made; if the circumstances show, that the banker knew, he was lending the money to that person in such a manner not to be applied conformably to the duty of the executor; or, as in the instance of the future advances to Mrs. Tyler, though *bonâ fide*, not in the character of executor, but as a trader, without any connection with that character. If there was nothing more in the case, it is very difficult to admit the proposition, that the banker could have received a deposit of these bonds, knowing them to be such, from these persons, as security for a debt then to be contracted; but the nature of the contract itself, the circumstance, that their own property was also delivered over, and other circumstances, showing, that the loan was made to them, not as executors, but as army-agents. The Master of the Rolls truly observes, that there is a great difference between advancing money at the time upon securities, and taking a security in discharge of an antecedent debt: but that is by no means conclusive. The argument is carried nearly to this extent; that a person, lending money

[\* 171] at the time upon the deposit of the securities, can hardly be supposed to mean fraud; as there is no \* temptation to fraud. Admitting however, that the bankers had no other motive for the advance upon such a deposit than they generally have, if it appears in the transaction itself, that the borrower is about to apply the money so raised on the testator's property, to objects, with which his affairs have no connection, I should hesitate to say, that as the temptation was so slight, this Court would not examine, whether that was not a most inequitable transaction with reference to the persons, entitled to that property.

I think, however, that this Decree ought to be affirmed. The circumstances, that make it dangerous to disturb the decision, are these. The testator died in 1786; and the Bill was filed in 1804 by persons, not stating any interest in themselves in this property; hardly stating a duty to be executed on their part, as executors, for some persons, interested in it, not appearing on the record; representing, that the Plaintiffs placed their confidence in these two executors, residing in England, in this sense; that during that period they would not have any concern in the administration; or even prove the Will until after the bankruptcy. Farther, this is a case, in which Ross and Ogilvie being the only acting executors, no transaction with reference to the testator's property took place until the end of the year

1792 : six years and a half after the testator's death ; the parties representing, that an account was kept between themselves and the estate, upon which they were, or might be, frequently in advance. If there are any other persons, interested in this property, they are not before me : if any, upon whom a duty was imposed with reference to it, they never interfered, from the testator's death, in 1786, to 1801 : a period of fourteen years ; in which these repeated pledges were made. This is also a case, in which the bankers had not, as in *Scott v. Tyler*, any previous \*knowledge of the [\* 172] property ; which in that case remained in their hands from the time of the deposit unconverted for any purpose, until taken out for that purpose ; but this property was six years and a half after the testator's death transmitted by these executor's in pledge ; returned some years afterwards ; again pledged the following year ; and again returned. Has this Court ever said, that a deposit under such circumstances could be disturbed at the instance, not of legatees of any kind, but of co-executors ; who did not interfere in the affairs of the testator during fourteen years ? This appears to me to be a much stronger case than any, in which this Court has interposed against the act of an executor ; and upon these grounds I do not disturb this deposit : but I do not decide, or give any opinion, how far, if the title to these bonds was nothing more than deposit, any thing can be done to improve the title, with reference either to these executors, or other persons, interested in the estate ; who are not before me : if they were, I should be obliged to consider the principles, stated by the Master of the Rolls in *Elliot v. Merriman* (1), by Lord Kenyon in *Bonny v. Ridgard*, and by Lord Alvanley, in *Andrews v. Rigley* (2), the only material case that I have omitted.

The Decree was affirmed (3).

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SEE, ante, the notes to S. C., 14 V. 353.

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- (1) Barnard. Ch. Rep. 78 ; 2 Atk. 41.  
(2) 4 Bro. C. C. 125.  
(3) Keene v. Robarts, 4 Madd. 332.
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## PERRY v. PHELIPS.

[1810, JULY 20, 21, 24.—ANTE, VOL. IV. 108.]

TRUSTEE for the purchase of land died without personal assets ; having purchased land. If the trust could have been executed during his life, which upon the construction was questionable, yet no part of the trust-fund being traced, and the circumstances affording no presumption, that the purchases were made in execution of the trust, they were not held liable (a).

Bill of Review may be also a Bill of Revivor and Supplement (b).

Error apparent, to support a Bill of Review, must be plain and obvious ; as a Decree against an infant without day to show cause : not merely an erroneous Judgment, which might be the subject of a re-hearing.

Whether a Bill can be maintained as a Bill of Review, in case the Decree should have been enrolled, or, if not, as a Bill of Revivor and Supplement, with a prayer in the alternative, adapted to either case ; whether there is any instance of a Bill in the nature of a Bill of Review upon error apparent, or matter of law, to be collected from the pleadings and evidence, a Supplemental Bill being required only to introduce new facts, to come on with a re-hearing of the original cause ; *Quare.*

For a Bill of Review on newly-discovered facts the leave of the Court necessary, [p. 177.]

Distinction between a Bill of Review, and a supplemental Bill in nature of it. If the Decree is enrolled, it is strictly a Bill of Review ; and prays, that the Decree may be reviewed and reversed : if not enrolled, the prayer is, that the cause may be re-heard. In either matter of supplement or revivor may be introduced, with the proper prayer, [p. 177.]

Possibility a present interest ; and capable of devise, [p. 182.]

THE Decree, pronounced in this case on the 31st of July, 1798 (1), ordered among other things, that the Bill of Maria Perry should stand dismissed, against the Defendants Thomas Smith and William Phelps, the heir at law of Edward Phelps, with costs ; and should also stand dismissed, as far as it sought to charge the real estates of Thomas Lockyer, on account of the trust under the Will of John Lockyer.

The Bill in this cause was filed on the 3d of March, 1806, by George Lockyer Perry and Charles Hart and Sophia, his wife, late Sophia Perry : George Lockyer Perry and Sophia Hart being the children and devisees of Maria Perry ; stating, that the Decree of 1798 had not ever, or until very lately, been signed and enrolled ; and as to so much as directed that the Bill of Maria Perry [\* 174] \* should stand dismissed against Thomas Smith and William Phelps with costs, and should also stand dismissed, as far as it sought to charge the real estate of Thomas Lockyer, it was erroneous ; and ought to be reversed ; as it appears by the Decree

(a) See ante, note (a) S. C. 4 V. 108.

(b) With regard to Bills of Review and Bills in the nature of Bills of Review, see Story, Eq. Pl. § 403 to § 425, where the points established by the present case are considered. See also, *Whiting v. Bank of U. S.* 13 Peters, 6, 13 ; *Dexter v. Arnold*, 5 Mason, 303, 310, 311 ; *Web v. Pell*, 3 Paige, 368 ; *Wiser v. Blackley*, 2 Johns. Ch. 488 ; *Livingston v. Hubbs*, 3 Johns. Ch. 124 ; *Pendleton v. Fay*, 3 Paige, 204.

(1) *Ante*, vol. iv. 108 ; *Lench v. Lench*, x. 511 ; *Denton v. Davies, post*, xviii. 499.

and proceedings, and particularly by the Decree itself, that there was a large deficiency in the personal estate of Thomas Lockyer to answer what had come to his hands on account of the rents and profits of the real and personal estate of John Lockyer, subject to the trusts of his Will, and thereby directed to be laid out in the purchase of lands, and that the real estate, which had been purchased by Thomas Lockyer, ought to have been charged with the deficiency ; and Thomas Smith and William Phelps ought to have been ordered to convey a sufficient part of the purchased estates upon the trusts of John Lockyer's Will.

The Bill also stated that some farther proceedings were in the life of Maria Perry had in the suit : but she died on the 21st of March, 1802 ; and the suit was revived against the heirs at law and personal representatives of the infant Thomas Smith and other proper parties. The prayer of this Bill was, that the Decree may be reversed accordingly ; and the Plaintiffs relieved against it ; or, at least, that they may have the suit, abated by the death of Maria Perry, restored and made perfect against William Phelps, and the other Defendants, the heirs, devisees, and personal representatives, of Thomas Smith : so as to be in the same plight and condition as they would have been in against Maria Perry.

The Defendants, the representatives of Thomas Smith, by their Answer stated, that the Decretal Order of July, 1798, hath been duly enrolled in this Court ; and submitted, that, the said suit, as to so \*much as sought to make the real estate of [\* 175] Thomas Smith liable to the trusts of John Lockyer's Will, having been dismissed, as aforesaid, the Plaintiffs have no right to revive the said suit against the Defendants ; or, if they have, are not entitled to such relief as is prayed against the Defendants in respect of the estates of Thomas Smith or Thomas Lockyer, to which the Defendants are entitled.

A preliminary objection was taken to the form of this Bill.

Mr. Richards, Sir Samuel Romilly, and Mr. Trower, for the Defendants, contended, that this Bill was contrary to the whole course of practice : not a Bill of Review ; but a Bill in nature of a Bill of Review, for error apparent, and also a Bill of Revivor and Supplement, altered by amendment to a Bill of Supplement, containing matter, the subject of a Bill of Review, with an alternative prayer, adapted to either of the cases stated ; that the Decree was, or was not, enrolled ; as it should, or should not, be considered a Bill of Review ; the effect of which is, that no point can be put in issue. This is also an attempt to obtain the object of a rehearing at a much greater distance of time than the period, limited for a Re-hearing or Appeal. The cases of error apparent, put in Mr. Cooper's and other books of practice, are upon manifest error in legal conclusion : but in no instance has an erroneous conclusion, formed upon a complication of facts, being held to constitute error apparent.

Mr. Hart, Mr. Hall and Mr. Bell, for the Plaintiffs.—There is no

doubt, that a Bill of Review may be at the same time a Bill of Revivor and Supplement. That is clearly laid down by Lord Redesdale (1); referring to authorities in Vernon (2) and Hardres (3); and there are modern instances without objection. Many cases may be put; showing the necessity of such a practice. No objection arises from its being, not an original but a supplemental Bill, afterwards turned into a Bill of Review. The Court looks only to the amended Bill. That is the Record. Neither is there any objection from the statement and prayer. In either case the Plaintiff has a right to have the Decree reviewed: if enrolled, by a Bill of review: if not, by a Bill in nature of a Bill of Review.

The Lord CHANCELLOR [ELDON]—There is no objection to this Bill; as being on the face of it a Bill of Review and also a Bill of Revivor and Supplement; as in some cases the Bill must of necessity be both a Bill of Review and a Bill of Revivor; and in some a Bill of Supplement also, in addition to those two descriptions. Admitting, that there is not much difference between a Bill of Review and a Bill in nature of a Bill of Review, I have considerable doubt upon this Bill; whether, the Plaintiff must not, as far as he seeks relief, determine, that his Bill shall be either a Bill of Review or a Bill in nature of a Bill of Review; and I apprehend, I should let in a mischievous practice by not requiring him to make that determination, whether his cause should be treated as introduced by a Bill of the one or the other description. If it is competent to a Plaintiff, not filing a Bill of Review, together with a Bill of Revivor and Supplement, in order to have the relief, which may be obtained by such a Bill, but stating, that he will not determine, whether there is error apparent in the Decree, contending that there is; but, in case it shall not prove so, electing in his prayer, to make it a mere \* Bill of Revivor, or Supplement, or both, the consequence is, that all the protection against a Bill of Review, founded on error, apparent in the Decree, is gone by the effect of that alternative prayer. In the case of newly discovered facts the leave of the Court must be obtained; which gives protection: but this difficulty occurs from putting the case in the alternative; that the Defendant can neither plead nor demur: he must be brought to a hearing; and may incur all the vexation of a suit; whether it shall turn out to be a Bill of Review, or not. Upon these grounds I have considerable doubt, whether the Plaintiff can put his case in the alternative; as a Bill of Review; or, if the Court shall think it not so, then as a Bill of Revivor and Supplement.

There is this difference between a Bill of Review and a supplemental Bill in nature of a Bill of Review. In the former, if introducing also matter of Supplement or Revivor, the prayer, as far as it is a Bill of Review, is, that the Decree may be reviewed and re-

(1) Mitf. 81.

(2) 1 Vern. 135.

(3) Hardr. 104.

versed : in the other, adopting also the proper prayer for Revivor, as to the supplemental matter, you pray, that the cause may be re-heard. In that respect also I doubt, whether this is an accurate record in not stating positively the fact, whether the Decree is enrolled, or not. If it is enrolled, the Bill is a Bill of Review, strictly speaking : if not, it is a Bill in nature of a Bill of Review ; and then, according to Lord Redesdale (1), the Plaintiff, stating, that there is error in the Decree, prays, that the cause may be re-heard.

\* With regard to the other point, there is a great distinction between error in the Decree and error apparent. [\* 178] The latter description does not apply to a merely erroneous judgment ; and this is a point of essential importance ; as, if I am to hear this cause upon the ground, that the judgment is wrong, though there is no error apparent, the consequence is, that in every instance a Bill of Review may be filed ; and the question, whether the cause is well decided, will be argued in that shape : not, whether the Decree is right or wrong on the face of it. The cases of error apparent, found in the books, are of this sort ; an infant not having a day to show cause, &c. ; not merely an erroneous judgment.

I farther doubt upon this case, whether a Bill in nature of a Bill of Review can be filed upon matter of Law. Where the Decree has been enrolled, there are two grounds of Review : error apparent ; and new facts ; or facts, newly discovered. In the first case the Plaintiff has a right to file a Bill of Review : in the two latter cases he must have the leave of the Court. Where the objection is upon matter of Law apparent, or a mistake in Law, to be collected from all the pleadings and evidence, the Decree not being signed and enrolled, it is the subject of a re-hearing ; and there is no occasion for a Bill in nature of a Bill of Review, unless a supplemental Bill is also necessary ; to introduce new facts ; in which case the cause will come on to be heard upon the matter of that supplemental Bill together with a re-hearing of the original cause (2) ; and the Court will vary the Decree upon the re-hearing ; taking into consideration the new, or lately discovered, facts : but I apprehend, there is no instance of a Bill in nature of a Bill of Review upon error apparent.

\* I will hear the cause upon the merits, before I give my [\* 179] opinion upon the question of form.

Mr. Hart and Mr. Hall, for the Plaintiff.—With regard to the merits, the principle is very narrow ; that what is contracted to be done is in a Court of Equity considered as done ; and, farther, that what a man has undertaken to do in pursuance of a trust, reposed in him, the Court will consider him as intending to do. Though there is no more evidence of intention than what arises from the act done, yet from the obligation upon him to do the act, in consequence of the trust reposed in him, an implication arises upon principles of

(1) Mitf. 82.

(2) *Moore v. Moore*, 2 Ves. 596.

equity, that he intended to do what he ought to do. The duty of Thomas Lockyer was, when his son attained the age of twenty-one, to lay out the fund of accumulated rents in a purchase. Having no property of his own to apply to that purpose, this accumulation was the only fund. He cannot be supposed to intend such a fraud by subtracting that fund from the trust; disposing of it in the shape of real estate, not charged by his Will with debts; and not leaving any personal property. There is no evidence, that he considered this fund as his own; according to Lord Rosslyn's observation. If he did so consider it, he intended, that it should be applied according to the rights of the parties entitled. It would have been difficult to pursue the estate, if he had borrowed the money; the relief depending wholly on the fact, that the purchase was made with these very rents. *Lechmere v. Lechmere* (1) and the other authorities upon this subject are decisive; and in the absence of positive evidence the just presumption from the circumstances is, that the fund was, as it ought to have been, applied in this purchase.

[\* 180] \* Mr. Richards, Sir Samuel Romilly, and Mr. Trower, for the Defendants.—Until the death of Thomas Lockyer it was impossible to ascertain any one individual, as the person, entitled to this estate. The proposition, that if a trustee under a trust to purchase land makes a purchase, he must be presumed to do that in the execution of his trust, is new. In the case of *Lewis v. Madocks* (2), though the husband had no other property, with which he could purchase land, except that, which was bound by the trust, your Lordship would admit the wife only as a creditor on the estate for that money, not as entitled to the estate. Upon the facts of this case all ground of presumption fails. Thomas Lockyer, receiving this small annual income of trust-property, makes from time to time considerable purchases; under circumstances, amounting to a breach of trust, if intended as an investment of the trust-fund. He was not to lay out the rents in a purchase, until a younger son attained the age of twenty-one; but was bound to accumulate them; to be laid out at that time.

The Lord CHANCELLOR [ELDON].—I observe, upon the Report of this case (3), when it was before Lord Loughborough, that I thought myself obliged to argue it as falling within the authority of *Lechmere v. Lechmere* (4) and *Sowden v. Sowden* (5); and, being interrupted by the observation of the Court, that the point required a much broader principle than would limit the demand to the deficiency of the personal assets, and we must insist, that all the purchases were \* made for the *cestui que trust* under this Will, I felt myself obliged at the moment to make that admission: but upon recollection I fear I did not perfectly comprehend the

(1) For. 80.

(2) *Ante*, 48; vol. viii. 150.

(3) See *ante*, vol. iv. 115.

(4) For. 80.

(5) 1 Bro. C. C. 582.

case at the time ; that I missed one point ; whether there was really any trust to lay out this fund in land until the death of Thomas Lockyer. If therefore this case stood now upon the merits, two questions would arise : first, whether during his life there was any trust to lay out the fund in land : secondly, assuming, that there was no such trust, yet, if it appeared by the Master's Report, that these rents had been so laid out, as to the effect of that, unconnected with any trust to lay them out during the life of Thomas Lockyer. With regard to the former proposition, it is not necessary now to decide, how far the two cases I have mentioned, both upon a question under a covenant in a settlement upon the issue of the marriage, govern such a case.

This is an extremely remarkable Will with reference to that subject. The testator, it is plain, contemplated the event, that his brother, having then only two sons, might have more ; and expressly declares the trust, if he shall have no younger son, that shall live to attain twenty-one, then until such only son shall attain the said age : but on that event the father's trust was not gone ; as he might afterwards have another son, who might attain that age ; in which case the eldest could not take. The question upon the whole clause, connecting the construction of it with the rest of the Will, and attending to the object, is, whether the father's trust was to cease, before it could be determined, whether there would be a younger son, who should attain twenty-one. If, when the eldest attained twenty-one, there had been one, or more, under that age, and all died under twenty-one, except the youngest, then only ten years old ; it is clear, the trust must have continued, until he attained

\*twenty-one, whether during his father's life, or afterwards : [\* 182] or until by his death under that age after his father's decease the only surviving brother became the ascertained *cestui que trust*. That event could not determine during the father's life ; and the testator did not recollect, that there might be a long interval between the periods, when the eldest might attain twenty-one, and, when it could be determined, whether he or some other son was the *cestui que trust*. It was therefore held, that to the eldest son was given only a possibility ; which is a present interest certainly ; and has been held capable of devise (1). It is clear, that the personal estate was to be improved as personal, until a son became entitled to the real estate : and was then to be laid out in land, to be settled to the same, uses. The construction of Mr. Justice Buller, in the first instance, and of Lord Thurlow afterwards, was, that upon the whole Will the intention was, that the accumulation should proceed, until a younger son should attain the age of twenty-one ; or it should appear, that a son, of that age, was the only son, who reached it ; that therefore was no trust to lay out the fund, until the whole could be laid out together ; and the trust to make a purchase could not arise before the father's death.

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(1) Roe, on the demise of *Perry v. Jones*, 1 H. Blackst. 30 ; 3 Term Rep. 88 ; Pollex. 44 ; Fearne, 440, 3d edit. *Ante*, vol. i. 254.

It is said, that question is concluded by this Decree; and with regard to that it was contended, not that the money, received, before the son attained twenty-one, was a trust; but that the personal estate of Thomas Lockyer should be first applied in payment of what was due on account of those rents and profit; and, if there should be a deficiency of the personal estate, that a sufficient part [\* 183] of the real estates, purchased by Thomas \* Lockyer, should be considered as purchased on account of the trust. Upon this, which is called a Bill of Review, no more evidence appears than that Thomas Lockyer, whose assets the Plaintiff seeks to make answerable, had a large personal estate. The fact, that his personal representative admitted assets, is upon the record; and it cannot be represented, that he was not a man of substance. The Master's Report states, that he bought estates, lent money on mortgage, bought stock, and improved the property in his hands in all ways: but it is not ascertained upon the record, brought here by Bill of Review, that one shilling of this property can be ear-marked, as laid out in land. The whole may have been laid out in personal estate. It is not ascertained, what was the money paid on any one purchase; and, if the Report is deficient in those respects, the defect cannot possibly be cured upon a Bill of Review. Farther, it could not be ascertained before the death of Thomas Lockyer, whether he would have a younger son, who would attain twenty-one. The inference is rather, that the fund was laid out, as more agreeable to the trust, not in land, but in personality; capable of that sort of improvement, directed with reference to the ultimate object to lay it out in land. Upon the whole the clear conclusion is, that I could not vary this Decree, dismissing the Bill, if it was before me on a proper Bill of Review.

I am glad to be relieved from the necessity of determining the point, whether this is a Bill according to the forms of the Court; of which however I must take some notice; as of great interest to the practice of the Court and the suitors in general; and to guard against the conclusion, that I consider such a Bill sufficient. It must be open to plea or demurrer; if known to the forms of the Court: or, as in the late case of *Young v. Keighly* (1), to an application, \* that it may be taken off the file, as a novelty; and it would be competent to make the objection at the hearing. At present, having no doubt upon the merits, I shall guard against future mischief by declaring in the Decree, that it is not necessary to give my judgment upon the form. The Defendants must have the costs.

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SEE, ante, the notes to S. C., 1 V. 251.

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(1) *Ante*, vol. xvi. 348.

## HARTOPP v. HARTOPP.

[ROLLS.—1810, APRIL 28, 30; AUGUST 7.]

SATISFACTION of a Legacy by a parent to a child by a portion of the same amount, though with some circumstances of difference (a).

Whether parol evidence can be admitted originally of an intention to substitute the one provision for the other, or only where it is first offered against the presumption, it is clearly admissible to show, that the father was the author of the portion: viz. by stipulating on joining in the marriage-settlement of his eldest son for a charge, and giving up interests in consideration of it.

In the case of double provisions by a father for a child slight circumstances of difference not regarded, [p. 191.]

Whatever is wanting to show the consideration, and from whom it moves, may be supplied by evidence *déhors* the deed; where such evidence does not contradict the deed (b), [p. 192.]

EDWARD HARTOPP WIGLEY by his Will dated the 13th of May, 1796, gave the sum of 3000*l.* sterling as and for the portions of his daughter Juliana Hartopp Wigley, William Evans Hartopp Wigley, and of such other child or children, if any, who might be hereafter born in his life-time or within due time after his death, to be equally divided between them, and to be a vested interest in them respectively at the time or times following: (that is to say) if a daughter on her attainment of the age of twenty-one years, or on the day of her marriage with consent of her guardian: but, if his said present or any future daughter should marry without such consent, then her portion should not be vested until her attainment of the age of twenty-one; and he willed, that the share or portion of his said youngest and any after-born son as aforesaid should be vested in him or them respectively at the attainment of the age of twenty-one years; and in case any or either of his said present daughter and \* younger son and such after-born child or children as [ \* 185] aforesaid shall die without attaining a vested interest in any part of the afore-mentioned sum of 3000*l.* as aforesaid, then he willed, that the share of such child or each and every such child so dying shall accrue and belong to the survivors or survivor or others or other of them; and shall be vested at the same time with his, her, or their, original share or shares; and be equally divided between them, if more than one; and that the like share, chance of

(a) The present inclination of Courts of Equity is against raising double portions. See *ante*, note (1) *Ellison v. Cookson*, 1 V. 110; 2 Story, Eq. Jur. § 1110; 2 Williams, Exec. 955.

(b) Where a deed, after stating a certain consideration, adds, "and for other considerations," parol evidence is admissible to show what those considerations were. *Benedict v. Lynch*, 1 Johns. Ch. 370; see also *Harvey v. Alexander*, 1 Randolph, 219; 2 Stark. Ev. p. 548, 549, and notes; *ante*, note (a) *Hare v. Shearwood*, 1 V. 241.

Parol or verbal evidence may be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers. In the term "subject" is included every thing to which the instrument relates, as well as the person, who is the other contracting party, or who is the object of the provision, whether it be by will or deed. 1 Greenl. Ev. § 286; Phil. & Am. Evid. 732, n. (1).

accruer and survivorship, shall extend to such surviving shares, as before expressed concerning the original shares; and he farther directed, that in case by the death of his present eldest son his said present younger son should succeed to his estates, before he should have attained the age of twenty-one years, his share of the above-mentioned sum of 3000*l.* should go over to his sister or sisters and younger brother or brothers, if any, in the same manner as if he had died under age; and so in like manner if any other son hereafter to be born shall succeed to his (the testator's) said estate before attaining the said age of twenty-one years: Provided always that notwithstanding he had thereby deferred the vesting of his said children's portions until such respective ages and times as above-mentioned, the same should carry interest from his death at the rate of 5*l.* per cent. per annum; and he declared, that it should be lawful for his executrix, &c. to advance and apply a competent part of the interest and annual proceeds of each child's presumptive share of the afore-mentioned sum for his or her maintenance, clothing and education; and that the residue of such interest should accumulate and be added to the principal of such respective shares, and be invested therewith in manner after-mentioned; and he farther empowered his said executrix, &c. to advance any part, not exceeding one third part of the principal share, which his present or any after-born younger son or sons should for the time being be presumptively entitled to on coming of \*age, during the minority of such son or sons; and to apply the same in buying him or them a commission in the army, or establishing such son or sons in any profession or business; and in order to make the fortunes of his said daughter and present younger son as equal as may be, the former being entitled to a greater proportion than the latter of the money already arisen and received from the rents of the estates at Freeby, he gave the sum of 500*l.* sterling as and for an addition to the portion hereinbefore provided or intended for his said younger son William Evans Hartopp Wigley; and to be a vested interest in and to be payable to him at the same time with his share of the afore-mentioned sum of 3000*l.*; and in case of his dying under age to go over to the same person or persons as shall eventually be entitled to such share, and to carry interest from the testator's death after the like rate and in like manner, and such interest to be applicable for the same purposes as already expressed concerning the said sum of 3000*l.* and the interest thereof; and the testator charged the residue of his personal estate and also certain real estates with the payment among other things of the said two sums of 3000*l.* and 500*l.*

By indentures of lease and release, dated the 17th and 18th of May, 1808, reciting a settlement, made in 1782, in consideration of the marriage of Edward Hartopp Wigley and Juliana, his wife, by which several estates were limited to Edward Hartopp Wigley for life; with remainder subject to a term of 500 years, to the use of Edward Hartopp, the eldest son, in tail male; with remainders over:

and that the trust of the term was to receive the sum of 2000*l.* for the portion of William Evans Hartopp Wigley, payable, as therein-mentioned, after the death of Edward Hartopp Wigley, with interest from his death, it was witnessed, that, in consideration of a marriage between Edward Hartopp and Anna Eleanor Wrey, Edward Hartopp Wigley and Edward Hartopp conveyed Dalby House, with other estates \* in Little Dalby, comprised in [\* 187] the settlement of 1782, to the intent that a recovery might be suffered ; to enure as to the mansion-house and premises in Little Dalby to the use of trustees for 600 years ; and after the expiration of that term, and subject thereto, to other uses ; and it was declared, that the term of 600 years was so limited to the Defendants Simpson and Fowke upon trust by mortgage or sale or other disposal of the premises, &c. to raise the sum of 2100*l.* for William Evans Hartopp Wigley ; to be a vested interest in him forthwith on the commencement of the said term of 600 years ; and to be paid to him or his representatives on the 23d of October (when he would attain twenty-one,) with interest from the commencement of the term after the rate of 4*l.* per cent. per annum ; and which said sum of 2100*l.* was thereby declared to be in satisfaction of a debt due to the Plaintiff from his father, Edward Hartopp Wigley, as therein mentioned : and also in the case and event of the Plaintiff surviving his father Edward Hartopp Wigley, and not otherwise, by all or any of the ways and means before mentioned, &c. to raise and levy the farther sum of 3500*l.* for the Plaintiff ; to be a vested interest in him on the decease of said Edward Hartopp Wigley ; and to be paid within six calendar months then next following, but without interest.

Juliana Wigley, the wife of the testator, died in his life ; and he died on the 30th of June, 1808.

The Bill was filed by William Evans Hartopp Wigley, the only surviving younger child of the testator, his daughter Juliana Hartopp Wigley having died in his life, against Edward Hartopp, the eldest son, and the trustees of the term ; praying, that the trusts of the Will, as far as regards the two legacies of 3000*l.* and 500*l.* may be performed ; and that he may also be decreed to be entitled to the said provision of 3500*l.* under the trust-term created by the marriage settlement, &c.

\* The Answer submitted, that the provision, made for the [\* 188] Plaintiff under the settlement, ought to be considered as an ademption of and substitution of the said two legacies of 3000*l.* and 500*l.*

The Defendant went into parol evidence. The solicitor, who prepared the deeds of 1808, by his depositions stated, that during the treaty for the marriage in 1807 the testator desired the deponent to bring his Will ; and, asking, whether the Plaintiff would not in consequence of his sister's death have under the Will 3000*l.* from the testator's unsettled property, and being answered in the affirmative, inquired, what was due to the Plaintiff in respect of the Freeby rents, in the county of Leicester ; which belonged to the testator and his

children jointly, but had been wholly received by the testator; and also what debts the testator owed on security. Being informed, that the probable amount of the former was about 2100*l.*, he desired to have an account in writing of these particulars, and of what the Plaintiff would be entitled to under his Will; and said, his intention was, that the Defendant should undertake to pay the whole of the money to the Plaintiff, to be charged upon the settled estates: the 2100*l.*, which he called the debt, to be paid upon the Plaintiff's coming of age: he, the testator, himself paying the interest of it during his own life; and the legacies (meaning the 3000*l.* and 500*l.*), being the term he then and always afterwards used, when speaking of those sums, to be paid at his (the testator's) death; just as they would be under the Will. The deponent observing, that upon the same principle those sums would not carry interest in the mean time, and, if the Plaintiff died before the testator, would not be payable at all, the testator replied, "certainly;" as that was exactly what he meant: it being in fact the legacies, only put in another shape.

[\* 189] \* The deponent farther stated, that the testator fully understood, that the Plaintiff would have the 2000*l.*, provided for younger children under the marriage-settlement; and desired the deponent to explain the whole to the Defendant; who afterwards told the deponent, he had consented to the charge rather than come to an open breach with the testator; who might have defeated his pending treaty of marriage. The testator by letter desired the deponent to advise with the Defendant on the best means of securing the Plaintiff's money: 5600*l.*; observing, that it had been agreed on between him (the testator) and the Defendant to be charged on the settled estates (stating the correspondence on that subject); that the Defendant had instructions to state such charge to the friends of Miss Wrey; and accordingly, when the scheme of the settlement was drawn out, it was expressly stated, that the settled estates were to be charged, besides the 2000*l.* they were already subject to, with the farther sums of 2100*l.* and 3500*l.* for the benefit of the Plaintiff under the Will, and according to the contingencies, which had been proposed by the testator, and acceded to by the Defendant. The deponent mentioned to the testator, that, though there was no impropriety in the settlement stating the 2100*l.* to be in discharge of a debt, actually due to the Plaintiff (meaning his share of the Freeby rents), there certainly would be in alluding therein to the Will of a person, still living, by stating the 3500*l.* as in lieu of legacies; and suggested either a new Will, omitting, or a codicil to revoke, them. The testator assented; and said, the former would be done soon; and in the mean time they all knew, what was meant. Upon the execution of the deeds the testator repeated his satisfaction respecting the 2100*l.* and 3500*l.*; talked again of the arrangement of his affairs; saying, that he was not quite prepared, having been unwell,

[\* 190] to give the deponent the particulars of his Will; when the deponent on account of the delay said, it would be \* better to have a short codicil executed, when the charge

should have been completed by the Defendant's marriage, merely to revoke the legacies of 3000*l.* and 500*l.*; stating, that the sums were otherwise provided and secured for the Plaintiff. The testator assented; and the deponent accordingly should have prepared such a codicil, had not the illness and death of the testator prevented it.

Mr. *Richards* and Mr. *Shadwell*, for the Plaintiff, opposed the admission of the evidence; observing, that in all these cases evidence was first introduced to repel a presumption, previously raised: but in this instance, no presumption being raised by a double portion from the father, there was no ground for introducing evidence.

Sergeant *Palmer* and Mr. *Wingfield*, for the Defendant, referred to the various cases (1) of presumed satisfaction; the weakest that of a debt (2): the strongest that of a child, claiming a double portion; and, as to the parol evidence, *Coote v. Boyd* (3); where the evidence was offered in support of the presumption; and Lord Thurlow said, that when it is laid down, that evidence is admissible on one side, it must be so on the other: and they contended, that clearly it is admissible to show the nature of the transaction.

1810, Aug. 7th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The question is, whether the Plaintiff be entitled both to the sum of 3500*l.*, given by the Will to the younger children, and to the like sum, provided for him by the settlement; or whether the portions, given by the Will, are not deemed, or satisfied, by the provision, made \* by the settlement. Though the [\* 191] amount of the sums is the same, there are some circumstances of difference. Neither is to take effect in possession until the father's death: but the legacy is to vest in possession at the age of twenty-one or previous marriage of daughters with consent; with interest from the father's death; the provision by the settlement being payable within six months after his death without interest. The direction as to maintenance and advancement out of the legacy, during the time it is contingent, could have no application to the provision by the settlement; to be raised only in the event of the Plaintiff's surviving his father; and in that event payable within six months after the father's death, without interest. Upon the whole it is not clear, which is most advantageous for the objects of the provision: but the balance against the last, if any, is not such as, independently of other grounds, will warrant me to hold, that the one provision cannot be a satisfaction for the other.

It is settled, that in the case of double provisions by a father for a child, slight circumstances of difference are not to be regarded: at least, where the question is, not, whether a bounty is meant to satisfy a debt; but whether one bounty is to be substituted in the place of another. That the second provision is in this case a bounty as

(1) See *Bengough v. Walker*, ante, vol. xv. 507, and the references in the notes, 510; i. 112, 259.

(2) See *Wallace v. Pomfret*, ante, vol. xi. 542, and the references.

(3) 2 Bro. C. C. 521.

much as the first cannot be denied: the Plaintiff not having given any consideration for the charge in his favor. But it was not by the act of the father alone, but by the concurrent act of him and the eldest son, that the provision was made. It was therefore contended for the Plaintiff, that, as it does not appear, that the father was the author of both, or that both are to be borne by his estate, this is not a case, in which the presumption against double portions can have any application. On the other side evidence is offered to show, that the intention of all parties was to substitute the charge in the room of the legacy; and that the father bargained for such [\* 192] a substitution; \*as the condition, on which he agreed to concur in the settlement. The admissibility of such evidence was objected to by the Plaintiff; and, notwithstanding the cases, that were cited, I doubt, whether strictly it be competent in the first instance to give evidence of declarations of an intention to substitute one provision for the other. But I conceive it may be shown by extrinsic evidence, who is the author of a gift, where that does not appear on the face of the transaction. Whatever is wanting to show the consideration, and from whom it moves, may, I apprehend, be supplied by evidence *dehors* the deed; where such evidence does not contradict the deed. In the present case the probability, independently of any extrinsic evidence, is, that it was the father, who bargained for this charge in favor of his younger son. The evidence clearly shows that to have been the case; and proves that he made it a condition of his concurring in the settlement. The father is thus in effect the sole author of both provisions. By concurring in the settlement, which he was not bound to do, and giving up his life-interest in a part of the estate; and subjecting other part to an annuity; which might fall upon it in his life-time, he became a purchaser of the second provision, which makes the case the same as if it came directly out of his own estate. Then excluding all declarations of actual intention, the presumptive intention is a substitution of the 3500*l.*, thus provided by the father's means for the younger son in the room of the very same sum, given by the Will.

The Bill, as far as it sought payment of the sum given by the Will, was dismissed.

With respect to the *prima-facie* presumption against a child's claim to a double portion, and the admissibility of evidence to repel that presumption, see, *ante*, the notes to *Ellison v. Cookson*, 1 V. 100; note 6 to *Blake v. Bunbury*, 1 V. 194; note 2 to *Barclay v. Wainwright*, 3 V. 463; and note 2 to *Stratton v. Best*, 1 V. 285. How far the parol declarations of a testator are admissible evidence, to repel a legal presumption, see note 2 to *Clelland v. Leathwaite*, 2 V. 465.

## 50 GEORGE III. 1809-10.

## DUTTON v. MORRISON (1).

[1809, FEB. 27, 28; MAY 8. 1810, JULY 24.]

**ASSIGNMENT** by partners by deed of property, proved to be all their property, in trust for their creditors, with a proviso to be void, if all the creditors for above 20*l.* should not execute, or a Commission of Bankruptcy should issue within a certain time, is an act of bankruptcy: not, where, the deed being joint and not several, one never executed.

The Interest of each partner is his share of the surplus, subject to all the partnership accounts; and that Interest only is liable to the execution of a creditor (a). By the bankruptcy of one his Interest is devested and vests in his Assignees by relation to the act of bankruptcy. Therefore joint creditors under Judgment in Foreign Attachment, of the same date with the Commission, but subsequent to the act of bankruptcy, cannot have Execution against the joint property; which must be applied among all the joint creditors.

Assignment of property, retaining possession, fraudulent against creditors (b), [p. 197.]

Joint creditors cannot prove under a separate Commission of Bankruptcy for the purpose of receiving Dividends, but only to assent to or dissent from the Certificate. An account and application of the joint estate is directed on the application of any joint creditor: the residue to be distributed according to the respective interests of the partners, [p. 209.]

In the year 1806, Robert Rumbold, Robert Dutton, the younger, and James Houghton, carrying on business as merchants and co-partners, having shipped goods on an adventure to New Orleans, which proved unfortunate, called a meeting of their creditors; and by indenture, dated the 17th of December, 1806, they assigned to \* the Plaintiffs all and singular the goods, wares, merchandise, and effects, so shipped from England, as aforesaid, which had not been sold, and the produce of such part as had been sold, and disposed of, all goods, wares, and merchandizes, shipped or consigned back in return for the same, together with all invoices, policies, bills of lading, and other papers, relating thereto; upon trust to sell and dispose of such of the said goods as were unsold, and to get in and collect the property so assigned; and they constituted the Plaintiffs Dutton, and Gilgrest, and Mead, since deceased, their attorneys for that purpose; and it was declared, that the trustees should stand possessed of the property so assigned, after payment of the expenses of the trust, to pay and divide the several debts due from them, said Robert Rumbold, Robert Dutton, the younger, and James Houghton, to Plaintiffs Dutton and Gilgrest and the sev-

(1) 1 Rose Bank. Ch. 213.

(a) See ante, note (a) *Young v. Keighley*, 15 V. 557; note (b) *Taylor v. Fields*, 4 V. 396.

(b) For an ample review of the various and conflicting authorities on this matter, in England, and in the different States, see 2 Kent, Com. (5th ed.) 515-532.

eral other creditors, parties to said indenture, by an equal pound-rate, according to the amount of their respective debts ; and to pay the amount, if any should remain, unto Rumbold, Dutton the younger, and Houghton, in equal shares. The deed contained a proviso, that in case all the joint creditors, whose debts amounted to upwards of 20*l.*, should not execute the indenture by the time therein mentioned, or a Commission of bankruptcy should issue in the mean time, the said indenture should be void.

This deed was executed by Rumbold : but one of the partners never executed it. Several of the creditors, but not all to the amount of upwards of 20*l.*, having executed it within the time, some of those who had not, attached in the Court of the Lord Mayor of London the trust-property in the hands of Dutton, the trustee, and though notice was served on them, that a docket had been struck, and a Commission of Bankruptcy would be forthwith issued on an

[\* 195] Act of Bankruptcy antecedent to \* such attachments, they proceeded ; and on the 10th of May obtained verdicts in the attachments ; and entered up judgment.

A Commission of Bankruptcy issued against Rumbold alone, dated the 10th of May, on the Petition of a joint creditor, who had not executed the trust-deed ; and Rumbold was declared a bankrupt upon an Act of Bankruptcy, prior to the executions and attachments ; viz. by his execution of the indenture of assignment, and proof, that the premises thereby assigned, comprised the whole of his estate and effects ; and a provisional assignment was executed.

The Bill was filed by the two surviving trustees in the Deed, and the provisional assignee under the Commission ; charging, that the trust-money in the hands of the Plaintiffs being the joint estate of Rumbold, Dutton, and Houghton, is now by reason of the bankruptcy of Rumbold and the absence from the kingdom of the other partners, payable to the Assignees under the Commission, to be applied in satisfaction of the joint debts ; and prayed an Injunction against execution under the attachments, and that the trust-money in the hands of the surviving trustees under the trust-deed may be paid into Court, or to the other Plaintiff, the provisional Assignee under the Commission, for the benefit of the joint creditors.

Mr. Hart and Mr. Roupell, for the Plaintiffs.—Sir Samuel Romilly and Mr. William Agar, for the Defendants.—The question, first made, arose upon objections to the act of bankruptcy by the execution of the trust-deed : first, as not being a fraudulent conveyance within the \* bankrupt laws (1) : the Defendant's Counsel observing, that it was to be lamented, that the decisions upon that subject (2) had been made ; and they should not be

(1) Stat. 1 Jam. I. c. 15, s. 2.

(2) *Gayner's Case*, stated 1 Bur. 477 ; *Worseley v. De Mattos*, 1 Bur. 467 ; *Wilson v. Day*, 2 Bur. 827. See also 4 Bur. 2239 ; *Bulcher v. Easto*, Doug. 282 ; *Hassel v. Simpson*, 1 Bro. C. C. 99 ; Doug. 2d edit. 89, n. ; 1 Cooke's Bank. Law, 88 ; *Kettle v. Hammond*, 1 Cooke's Bank. Law, 89 ; 8th edit. 106.

extended: secondly, as being an imperfect deed; not capable of passing the property: viz. a joint Deed of Assignment, not executed by one of the parties; and also upon the effect of the proviso, making the deed void in case all the joint creditors, whose debts amounted to upwards of 20*l.*, should not execute within the time mentioned, or a Commission of Bankruptcy should issue in the mean time. For the Plaintiffs it was insisted, that such a Deed is completely within the spirit and meaning of the Bankrupt Law for the reasons given by Lord Mansfield: first, that the necessary effect is, that the person assigning ceases to be a trader: secondly, (which, it was admitted, had been frequently questioned,) that such a Deed is to be considered a fraud upon every creditor, who dissents from that mode of arrangement. Against the other objection it was said, that though the act, which would constitute an act of bankruptcy, was intended to be joint, the failure of one party to complete it, from whatever motive, would not prevent the effect of the act, done separately by the other.

The Lord CHANCELLOR [ELDON].—The foundation of the doubt upon these cases, which commence before (1) Lord Mansfield's time, is, that \*nothing can be an act of bankruptcy, [\* 197] but what the Statutes have made such. With regard to drawing visible stock from the creditors, that does not apply to traders only: but any man, assigning property, keeping the possession himself, is within the doctrine of *Twyne's Case* (2) guilty of a fraud. The doubt upon those cases is, whether a grant, not fraudulent by the Common Law, is to be considered fraudulent upon two principles: first, that the man can trade no longer: secondly, that it is an attempt to make a distribution of his effects, different from that, which the bankrupt law permits. The observation upon that has always been, that, until he becomes bankrupt, he has a right to make that distribution. It is however after all the decisions, that have taken place, much too late to disturb them: whether they should be extended is another consideration.

The act of bankruptcy, alleged in this case, if it is one, must be that, which is described by the Statute of King James (3): any fraudulent grant or conveyance of his lands, tenements, goods or chattels, to the intent or whereby his creditors shall or may be defeated or delayed for the recovery of their debts. Assuming for a moment, that this instrument was executed by all the three, and comprehends the whole, or nearly the whole (4), of their estate and effects, it would be very improper to intimate any doubt, that it is now to be considered perfectly settled, that such an instrument, though not a fraudulent grant at Common Law, is an act of bankruptcy.

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(1) *Gayner's Case, Ex parte Fbord*, before Lord Hardwicke, 31st July, 1755: stated 1 Bur. 477, in *Worsey v. De Mattos*.

(2) 3 Co. 80.

(3) Stat. 1 James I. c. 15, s. 2.

(4) *Worsey v. De Mattos*, 1 Bur. 467.

Taking this therefore to be the assignment of all three, two questions have been stated: first, whether the provision, that the deed is to be void, if a Commission of Bankruptcy shall be taken out, or if all the creditors do not sign within a given period, will, if without that provision the deed would have been an act of bankruptcy, prevent that effect; and upon that my opinion is, that this condition does not make it less an act of bankruptcy, than it would have been if the condition had not been inserted.

With regard to the other question, upon the fact, that this was intended to be a joint and several deed, if it has even been determined at law, I have not found the decision. It is purely a question of law; of great importance, and some difficulty; with reference to the doubt raised upon Lord Mansfield's decisions. In *Small v. Oudley* (1) the Master of the Rolls thought the deed not fraudulent; and, if it was not fraudulent at Common Law, the Statutes of Bankruptcy, not giving any new character to grants, it was not an act of bankruptcy; and then, though the effect of the execution of that deed was necessarily a cessation of the character of trader in that man, and that his estate and effects were put under a different course of distribution from that, ordained by the Bankrupt Law, yet Courts of Justice acquired the right to treat men as bankrupts by Parliamentary authority, and by that alone; and if he had not become a bankrupt, it was very difficult on principle to maintain, that they were at liberty to give such an instrument a different character, and to make more of it, than the Legislature had in those Statutes, describing, what shall be an act of bankruptcy: the law being perfectly settled, that nothing is an act of bankruptcy, though the consequences may be precisely the same, except what is described in the Statutes.

[\* 199] \* It has however undoubtedly been long settled, that if a trader conveys all (2) his estate and effects, that is an act of bankruptcy; as it seems, upon two principles; which Lord Mansfield always, or in most instances at least, held to be open to parol evidence: first, that by that Act the trader necessarily, perhaps not intending it, deprives himself of the power of carrying on his trade; as he may by many acts, that will not be acts of bankruptcy: secondly, that he endeavors to put his property under a different course of application and distribution among his creditors from that, which would take place under the Bankrupt Law; and the Court of King's Bench have so long held such an instrument, though not void at Common Law, to be an act of bankruptcy, that it is too late at this time to examine the principle. Lord Mansfield goes into all the circumstances: the time of night (3) at which the instrument was executed; what was to be the possession under it; and what the application of the property; stating, that the fraudulent intention is to be collected, not merely from the face of the instru-

(1) 1 P. Will. 427.

(2) See *Worsey v. De Mallos*, 1 Bur. 467.

(3) *Harman v. Fisher*, Cowp. 117.

ment, but from all the circumstances ; showing, what was its proposed operation.

The question then is, whether within the principles of those decisions, this deed is an act of bankruptcy ; attending to the true intent and effect of it, taken altogether ; to what was intended to be done, and what is to be considered as not intended ; if the whole, that was intended, was not capable of being done. Admitting, that this was not intended to be a several deed, but the creditors through the mutual agreement of all were to derive a benefit against each, if two retired from that agreement, and no bankruptcy had occurred, could the creditors have taken \*advantage of [\*200] the deed against the one, who executed ; but who, it must be admitted, did not mean to execute, so as to give the deed any effect, unless the others devoted their shares of the property to the same purpose ? I doubt, whether that would be the legal effect ; as in many cases the law considers a variety of instruments as forming one transaction : and would not give effect to any instrument, unless the whole transaction was completed. If this instrument had been delivered as an escrow, there could be no doubt ; and if it was delivered by one only for no other reason, but that the others could not execute, has that Act any effect, preventing his continuing a trader, or dedicating his property to any purpose whatsoever ? Under such circumstances I am unwilling to decide this question myself ; the more so from reflecting upon the necessity of extreme caution in determining what is an act of bankruptcy ; and the consequences, that may follow in criminal proceedings from permitting a Commission to issue, or to go on upon a doubtful act of bankruptcy ; which a recent instance (1) has forcibly impressed on my mind. Unless therefore you have other acts of bankruptcy, a case ought to be directed.

By consent it was ordered, that the cause should stand over ; and that affidavits should be made as to other acts of bankruptcy. Affidavits were accordingly produced of acts of bankruptcy committed by the bankrupt in October 1805, by keeping, and by quitting his house ; upon which the Defendants gave up that objection.

Mr. Hart and Mr. Roupell, for the Plaintiffs, upon the other question relied on the case of *Barker v. Goodair* (2), and \*what was said by the Lord Chancellor upon granting the [\*201] injunction in this case, as decisive against the attachments ; observing, that the only distinction was, that in *Barker v. Goodair* the judgment on the attachment was previous to the Commission ; and in this case the Commission issued on the same day : but the act of bankruptcy, and the docket struck, with notice, were long before.

Sir Samuel Romilly and Mr. William Agar, for the Defendants.

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(1) *The King v. Bullock*, 1 Taunt. 71 ; *Ex parte Bullock*, ante, vol. xvi. 452.

(2) *Ante*, vol. xi. 78.

—The case of *Barker v. Goodair* is not a decision against the right of joint creditors to resort to the joint effects notwithstanding an act of bankruptcy by one partner. The injunction was granted in that case, and in this, only with the view to have the question considered and determined. The effect of a separate Commission of Bankruptcy against one partner is, that his separate property, which, as far as it is derived from the joint estate, is merely his share of the surplus, after satisfaction of the joint debts, is transferred to his assignees. What jurisdiction has a Court of Equity to impeach the right of the creditor under a judgment against those specific effects? A Commission of Bankruptcy may be considered as an action and execution in the first instance: but an execution under a judgment at law transfers no part of the joint property; merely giving a right to an account: each partner having an interest, not in the whole, but in the surplus merely. The fund, against which judgment has been obtained, remains entire; and the bankruptcy cannot deprive the creditor of the fruit of his judgment.

1810, July 24th. The Lord CHANCELLOR [ELDON].—

[\* 202] \* The Report of the case of *Barker v. Goodair* (1) correctly represents my opinion, that, whatever might ultimately be done, it was fit, that the rights of the parties under the circumstances of that case should be judicially decided; and, that being my opinion, I certainly determined nothing upon the interlocutory motion but that it was not proper to let the property go out of the power of the Court, until that decision could be obtained.

The present case is this. Three persons, in partnership, propose to convey the whole of their property (for that is the effect of it), to trustees in trust for their creditors; with a proviso to be void, in case all the creditors to the amount of above 20*l.* do not execute; or, if a Commission of Bankruptcy should be taken out. In truth it would have been void, if it had been actually executed according to the intention. All the creditors to the amount of above 20*l.* did not sign the deed; and one of the assignees never executed. The Bill was filed upon the notion, that the Act of Bankruptcy, to be insisted upon against the attachments, was the execution of this deed; and upon the point made, when the cause came on, that the deed, not being executed by all the three parties, was no act of Bankruptcy (2). My opinion was, that, this deed being intended for execution by these three persons, and being incapable of being executed according to the trust unless by those three, could not be considered as an Act of Bankruptcy. It became immaterial however to consider that; as, an Act of Bankruptcy of an older date being proved, brought the case to this; that there was an act of Bankruptcy, preceding the verdicts under the attachments, on the 10th of May, and

[\* 203] \* a Commission actually issued. There was no actual ex-

(1) *Ante*, vol. xi. 78.

(2) *Post*, vol. xix. 296.

ecution therefore under the attachments at the time of the Commission issued ; and, if there had been, it was immaterial.

Under these circumstances the question is, what is the effect of the Commission, the attachments, under which verdicts of even date were obtained, and the preceding Act of Bankruptcy : I mean the Act of Bankruptcy, committed by this one partner : whether the attaching creditors, who have succeeded upon the plea of *nil debet* in the Mayor's Court, can find in the hands of the Plaintiff Dutton that property of the three partners, against which they can have execution entirely, as the property of the three : or, if not to be considered the property of the three, property, to which the title is such as among the three, that such a creditor can take, if not the whole, a part of it.

This question has been in a degree considered in two or three cases : never upon the hearing of a cause. In *Bristow v. Potts* (1), upon an application to Lord Loughborough for an injunction under circumstances altogether the same, his opinion was, that the assignees of one of the joint debtors had no equity to obtain an injunction against the creditors of all the debtors, having attached the property. When the case of *Barker v. Goodair* (2) came before me, I thought the point, as I do still, extremely important ; and I could not satisfy myself, that it was right upon the authority of *Bristow v. Potts* to refuse the injunction in that stage of the cause. The difficulty is this. If previous to the plea in the Mayor's Court, which is in effect to try, whether the property in the hands of [\* 204] the garnishee is the property of all the debtors, an Act of Bankruptcy is committed by one, and a Commission issues, I cannot conceive, the plea, that the property of the three was in the hands of the garnishee, could be made out in fact ; as by the Act of Bankruptcy by one, previous to the attachment, followed by a Commission, the interest of that one passed to his assignees ; and was no longer his interest. It is true, if the issue of fact in the Mayor's Court was tendered previously to a Commission, it would be difficult, perhaps impossible, to maintain, that the plea in fact would not be made good ; as, though the Commission, when taken out, will relate to the Act of Bankruptcy, yet, if a Commission should not be taken out, there is no negative of the fact, that this was the property of the three. If however a Commission should afterwards issue between verdict and execution under the attachments, the verdict giving a right to execution upon the property of the three, and the intermediate transaction devesting out of one by relation to the Act of Bankruptcy his interest in that property, the question would be, whether the execution could lay hold of the property of that one ; and the two Statutes of King James (3), declare, what it was not necessary to enact, when it was once determined, that the Commission should relate to the Act of Bankruptcy, that, as a judgment, if not executed

(1) In Chancery, 28th January, 1801. Stated *ante*, vol. xi. 81, note.

(2) *Ante*, vol. xi. 78.

(3) Stat. 1 James I. c. 15, s. 13; Stat. 21 James I. c. 19, s. 9.

before, or if executed after, an Act of Bankruptcy, is of no worth as against the creditors, so an attachment, not executed before, or executed after, an Act of Bankruptcy, as against the creditors affects only the interest of the bankrupt.

[\* 205] \* That being the effect of the relation, this Commission, the moment it was taken out, of even date with the verdicts, but founded upon an act of bankruptcy long previous to any suit in the Mayor's Court, in October, 1805, must have relation to that act of bankruptcy; and by virtue of that relation must vest the property of this individual partner in his assignees, as their property from that time. The consequence is, that this Plaintiff must be considered as having in his hands property, not of the bankrupt and the solvent partners, but which was to be disposed of, as it was just, and legal, and equitable, not as their property, but as the property of the assignees and the two solvent partners; and my doubt upon the case of *Bristow v. Potts* (1) was, whether, if that was not the property of the two partners, Lord Loughborough's conclusion, in effect that the creditors of the two debtors should have execution against it, as if it had remained their property, was right; and I still think that a difficult conclusion.

Another question remains, of far more difficulty, and of as much importance as any that has been decided. Where a creditor takes out execution against the effects of an individual, concerned in a partnership, it seems to be a very difficult thing to determine with certainty, how he is to take his execution. The old cases, if they are to govern, go in this simple course; that the creditor, finding a chattel, belonging to the two, laid hold of the entirety of it; considering it as belonging to the two; and, paying himself by the application of one half, he took no farther trouble. It is obvious, that it was very difficult to maintain this as an equitable proceeding;

a due proceeding at Law; that a creditor of one partner [\* 206] should without any attention to the rights of the \*partners themselves take one half of a chattel belonging to them; as if it was perfectly clear, that the interest of each was an equal moiety. On the other hand it may be represented, that the world cannot know, what is the distinct interests of each; and therefore it is better, that the apparent interest of each should be considered as his actual interest: but Courts of Equity have long held otherwise; and long before the case of *Fox v. Hanbury* (2) I understand this Court to have said, that was not equitable; and to have held, as is the constant course at present, that upon an execution against one partner, or the *quasi* execution in bankruptcy, no more of the property, which the individual has, should be carried into the partnership than that *quantum* of interest, which he could extract out of the concerns of the partnership, after all the accounts of the partnership were taken, and the effects of that partnership were reduced into a

(1) *Ante*, vol. xi. 81, note.

(2) Cowp. 445; see *ante*, *Taylor v. Fields*, vol. iv. 396; xv. 559, note; *Hankey v. Garrott*, i. 236, and the note, 239.

dry mass of property, upon which no person, except the partners themselves, had any claim. In the case, supposed by Lord Mansfield, a Bill filed, where there was an execution at Law, a Court of Equity has no difficulty in managing it; having the means of taking the complicated accounts of the partnership, and reducing the concern into that state, in which the property would be divisible as clear surplus: but the Court of King's Bench has repeatedly held, with considerable doubt of late, how the object is to be accomplished, that a creditor, taking execution, can take only the interest his debtor had in the property.

The case now before me must be regarded in this point of view. The question being as to the effect of the *quasi* execution under a Commission of Bankruptcy \*against one partner, [\* 207] with reference to the interest of himself and two others in a fund in the hands of the Plaintiff. The jurisdiction in bankruptcy being both legal and equitable, let us see, whether we must not of necessity go a great way in this case; or admit, that we have already gone much too far in bankruptcy. The opinion of Lord Hardwicke was, that a joint creditor could prove under a separate Commission only for the purpose of assenting to, or dissenting from, the certificate; but not to receive dividends; and that they must file a Bill for an account of the joint estate. The operation of that Bill was to draw into the joint estate the share of that bankrupt partner, taken in execution; as far as bankruptcy can be so represented; and by the effect of the Commission, the Bill, and the Decree, nothing could be divided among the separate creditors under the Commission but that, which formed the separate share of the bankrupt after the account, and an application of the joint estate to all demands against it. Lord Hardwicke therefore must either have thought, that upon such a case it was clearly fit to say, that execution against one partner should not affect the application of the joint fund to the joint demands; or, as I rather believe, he found himself in a situation, requiring him to cut the knot; and to make some rule, that would upon the whole be most convenient.

This subject took a different course at different periods until the time of Lord Thurlow; who considered it with great anxiety; and, having consulted most of the Judges, expressed his decided opinion, that the contrary course was the best, as being the most legal; and therefore held, that the joint creditors should be admitted to prove, and take dividends, under a separate Commission; that a Commission of Bankruptcy was an execution for all the creditors; that, if a joint creditor had brought an action \*against all the [\* 208] debtors, he might have several executions against each; and therefore the bankruptcy, preventing his action with effect, should be considered as a judgment for him as well as the others; that he had a right to receive the dividends; and it was upon the assignees of the separate estate to bring their Bill to have the account settled.

The question afterwards came to be considered by Lord Lough-

borough; who got back to the old rule; and abided by it firmly (1): but great difficulties occurred of this sort. Lord Loughborough, adopting the principle of Lord Hardwicke's rule, did not adopt his practice; not putting the joint creditors to file a Bill bringing before the Court the assignees and the solvent partners; and taking the account in their presence; but taking this course; directing the assignees to take an account of the joint estate; and, applying that to the discharge of the joint creditors, to ascertain the shares of the residue, belonging respectively to the bankrupt and the solvent partners. From the nature of this proceeding, unless the solvent partners thought proper to come in, and have the account taken before the Commissioners, the Lord Chancellor in bankruptcy had no power to compel them: neither could the joint creditors, unless they thought proper to come in before the Commissioners, be compelled in that proceeding to come in; and if the other partners did not, or could not, as in the instance of residence abroad, make themselves parties, the account upon ordinary principles could not bind them. I pressed the difficulty, that would arise, if a joint creditor should [\* 209] bring an action; \*and proceed to judgment: would this Court interfere upon the ground, that there was an order in bankruptcy, to which he and the other joint creditors were not parties; and to enforce that Order grant an Injunction against execution in that action? That would be a question of great importance, if the Law was as simple, as it was supposed to be in the early cases upon this subject; that the Assignees were tenants in common of a chattel with the solvent partner; and the creditor might satisfy himself out of the apparent interest: but, taking the law to be, that no more should be applied than the result of a general account, the only effect of the execution would be, that the creditor would have subjected himself to the general account, that was going on in another proceeding.

The question then came before me; and upon consideration of all the authorities I thought the best course for me to adopt (whether the best in principle I have often doubted) was, that the rule should continue to be applied, as it had been for some years in a course of application; and therefore I have not disturbed the practice; as it has of late prevailed. The result is, that now it has been understood for fifteen years, that under a separate Commission of Bankruptcy, the other partners remaining solvent, an account shall be directed of the joint estate in the absence even of the other partners; and upon the application of any one joint creditor, whether the others choose it or not, the whole account being taken in the bankruptcy, the joint creditors shall be paid *pari passu* out of the joint estate; and the residue shall then be distributed only according to the respective interests of the partners; and, if the rule of law, where a creditor takes execution, is the same, perhaps we are

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(1) *Anst. Ex parte Elton*, vol. iii. 238; *Ex parte Abell*, iv. 837; see *Ex parte Taitt*, xvi. 193, and the references in the notes, 194; iii. 243.

not far wrong. In the course of this period there has been no instance of a creditor, coming here; saying, that he had a \*judgment, not executed, against a partner; and desiring [\* 210] to go on: nor has the case occurred in bankruptcy of a joint creditor, claiming to set aside the execution under the Commission by a prior act of bankruptcy; and desiring to have execution against all without any account. Such a case, if it occurred, must be dealt with upon much the same principle as this.

This is the case of an act of bankruptcy in December, 1805; which severed the property of the bankrupt from the property in the partnership. From that moment the partnership effects were the property of the two solvent partners, and, if a Commission was afterwards taken out, of the Assignees. The effect of that Commission, if taken out before the execution, or after it upon a previous act of bankruptcy, is, that a part at least of the property, taken under the execution, would, in the latter case by relation, be the prop- of the Assignees; and here it is material to observe, that my opinion differs from that of Lord Loughborough; who thought, that the bankruptcy of one partner only would not, though founded upon a preceding act of bankruptcy, affect the attachments. I do not agree to that. My opinion is, that, if after an execution against one partner a Commission of bankruptcy issues against him upon an act of bankruptcy, antecedent to the execution executed, whatever may have been taken under the execution becomes by relation the prop-erty of his assignees at the time of that execution executed, and not of the bankrupt himself: the Comnission by relation devesting his interest.

What then is to be the case of these creditors; who, having attach- ments against the property of these three partners, while it was their property, did not obtain execution, until a Commission issued against one of them upon an act of bankruptcy, antece- dent to the attachments: \*by relation therefore devesting [\* 211] the property of that one? It is very difficult to maintain, that the attaching creditor can take the property of the two remaining partners; though he might take the property of the three, or of each: but admitting that he could take the property of the two, what is it, that he can take? Is it more than what will appear to be the property of the two after an account of the estate of the three and the joint demands upon them? There is infinite difficulty in it: but it appears to me, that, notwithstanding these attachments, under the particular circumstances the joint estate must be applied among all the joint creditors, as well the attaching creditors as the others. The bankruptcy making one third of this property the property of the Assignees, the question is, whether the creditors by attach- ment, though they have judgment, can take execution: and my opin- ion is, that execution under the attachment cannot go against the property of the two; if it could go against the property of the three, and of each, and that this is property, which must be applied among

all the joint creditors, exactly as the application is made in bankruptcy.

I have gone through this; as it is a very difficult subject; and, as it has often appeared to me, that both in bankruptcy and the administration of assets the Court has done more upon principles of convenience, than as standing upon legal reasoning.

An Account was accordingly directed of the joint estate; to be applied among all the joint creditors.

1. This case is also reported in Rose, 213.

2. In what cases an assignment of his property by a trader amounts to an act of bankruptcy, see, *ante*, note 1 to *Ex parte Richardson*, 14 V. 184: the act, it seems, must have been done with an intent to defeat or delay some of his creditors; formerly, it would have been sufficient to show, that creditors had in fact been thereby delayed: as to the admissibility of parol evidence in such a case, see *Ex parte Cawkewell*, 19 Ves. 234.

3. A bond sworn and executed by one partner on behalf of all is, in law, the obligation of the individual alone who executed it: *Ex parte Hodgkinson*, 19 Ves. 296: see note 2 to *Burn v. Burn*, 3 V. 573.

4. That the severity of criminal proceedings against bankrupts has been mitigated by late enactments, see note 1 to *Ex parte Bullock*, 14 V. 452.

5. In what cases a subsequent commission of bankruptcy will over-reach an attachment of the bankrupt's property abroad, or in the Lord Mayor's Court, see note 1 to *Ex parte D'Obree*, 8 V. 82: recollecting that the 81st section of the statute of 6 Geo. IV., c. 16, declares all executions and attachments against the lands or chattels of a bankrupt valid, if they were bona fide levied and executed more than two months before the issuing of the commission of bankruptcy; provided the person at whose suit such execution or attachment issued had not, at that time, notice of any prior act of bankruptcy committed by his debtor.

6. As to the due application of joint and of separate estate, to the discharge of joint or separate debts, and in what sense a commission of bankruptcy is in the nature of an execution, see notes 3, 4, to *Hankey v. Garrett*, 1 V. 236; note 5 to *Lyster v. Dolland*, 1 V. 431; and note 3 to *Ex parte Brown*, 2 V. 67. The 62nd section of the statute 6 Geo. IV., c. 16, allows joint-creditors to prove under a separate commission, for the purposes of voting in the choice of assignees, and of assenting to or dissenting from the bankrupt's certificate: but such creditors are not to receive any dividend out of the separate estate of the bankrupt, until all the separate creditors shall have received the full amount of their respective debts, with an exception in favor of a joint creditor who has taken out a separate commission as petitioning creditor; which course he is at liberty, under the 16th section of the said act, to pursue, as he was indeed before the statute: *Ex parte De Tastet*, 17 Ves. 250.

UPHAM, *Ex parte.*

[1810, AUGUST 6.]

**Commission of Bankruptcy against a distant Country bank executed in London.**  
 On account of the holders of small notes in the Country another Commission was ordered, to be executed there, for the purpose only of receiving proof of debts there: the proofs, so taken, to be received under the London Commission. Two Commissions of Bankruptcy having issued, and one being superseded, proofs under that ordered to be received under the other.

**Auxiliary Commission of Bankruptcy, to receive proof of debts in the Country, limited to notes under 20*l.*; and liberty to examine the bankrupts under it refused,** [p. 213.]

A COMMISSION of bankruptcy issued against Wilcocks and Co. bankers at Exeter: which was executed in London. A great number of their notes for 1*l.* being in circulation in Exeter and the neighborhood, this Petition was presented; praying that the Commission may be superseded; and that another Commission may issue, directed to Commissioners at Exeter: or that the time for the choice of Assignees may be enlarged, and that the meeting for that purpose, and the third meeting, may be held at Exeter: or that a special Commission may issue, directed to Commissioners at Exeter, for the purpose of receiving the proof of debts in that part of the country.

Mr. Cooke, in support of the Petition, stated, that the ground of the application was the expense of proving these small debts in the usual way by affidavit; and suggested, that, as all these notes were payable to the bearer, they might be bought up for the purpose of being proved under the subsisting Commission.

Mr. Hart, for the Assignees, who had been appointed after the Petition was presented, made no opposition.

The Lord CHANCELLOR [ELDON].—The objection to the mode of buying up these notes is, that they would be bought for little or nothing. In some way certainly this inconvenience must be provided for. Where two Commissions have issued, and one has been \*superseded, the proofs, taken under that Commission, though become a nullity, have been directed to be received under the other: a strong act; which, I think, furnishes a principle, that admits of application in some form in this instance. Let another Commission issue, directed to Commissioners at Exeter, for the mere purpose of receiving the proof of debts; and let the proofs taken under that Commission be received as proofs under the Commission in London (1). —

\* Such circumstances as those which occurred in the principal case are specially provided for by the 20th section of the statute of 6 Geo. IV., c. 96.

(1) The same course was taken soon afterwards in other instances of Country banks: *Ex parte Perry*, *Ex parte Scott*, 1 Rose's Bankrupt Cases, 12. In the former case the operation of the auxiliary Commission was limited to notes under 20*l.*; and in the latter liberty to examine the bankrupts under the auxiliary Commission was refused. The Stat. 6 Geo. IV. c. 16, s. 20, authorizes the Lord Chancellor to

## PITTS v. SHORT.

[1810, AUGUST 9.]

To a Bill by an heir against a claim under a devise for a discovery, and that the witnesses may be examined *de bene esse*, and their testimony recorded, a general demurrer for want of Equity being allowed, the Defendant was not permitted to demur *ore tenus* as to the examination of witnesses; not being made the subject of demurrer on the Record (*a*).

General demurrer lies; where the Plaintiff, though entitled to discovery, is not entitled to relief (*b*), [p. 216.]

THE Bill stated, that William Clarke, seised in fee of estates in the county of Gloster, died in February 1781, intestate, unmarried, and without issue; leaving — Clarke, son of his brother Player Clarke, his heir at law; that at the death of William Clarke, his said nephew was abroad; and in consequence of his absence [\* 214] and his ignorance of his uncle's death, \* Robert and William Parfitt, two other nephews of William Clarke, under a pretended Will entered into possession of the real and personal estate. Robert Parfitt died in 1805; having devised the moiety of the estates of William Clarke to John Short and the other Defendants, in trust for William Parfitt for life; with remainder to William and Robert Parfitt the younger, and Elizabeth Parfitt, natural daughter of William Parfitt the elder for their lives; with remainder to their issue, as tenants in common in fee.

The Bill farther stated, that on the death of Robert Parfitt the elder, his brother William by permission of the trustees entered into possession of the last-mentioned moiety; and he died in July last; having devised his moiety to Short and others, and their heirs, in trust for William and Robert Parfitt the younger, and Elizabeth Parfitt, at the age of twenty-one; with remainder to their issue, as tenants in common in tail, subject to an annuity of 50*l.* to his wife Elizabeth Parfitt. Upon his death, leaving William and Robert Parfitt the younger, Elizabeth, his natural daughter, and his widow, surviving, the trustees under his Will and the Will of Robert Parfitt the elder, entered.

The Bill proceeded to state, that William Clarke had, besides his said brother and sister Player Clarke and Mary Parfitt, another sister, Ann Clarke; who, as well as Player Clarke and Mary Parfitt, died in his life. Ann Clarke, in October, 1751, married Charles Rosen-dall; by whom she had one child, Mary, wife of the Plaintiff Wil-

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direct an auxiliary Commission for proof of debts under 20*l.*, and the examination of witnesses, on oath, or either of such purposes, with the same powers to compel the attendance of and examine witnesses, &c., as in an original Commission: such examination to be in writing, and annexed to, and to form part of, the original Commission.

(*a*) See *ante*, note (*a*) *Pyle v. Price*, 6 V. 779.

(*b*) See *ante*, note (*a*) *Brandon v. Sands*, 2 V. 514; note (*a*) *East India Co. v. Neave*, 5 V. 173; note (*a*) *Sutton v. Scarborough*, 9 V. 71; *Pcol v. Lloyd*, 5 Met-calf, 525; *Story, Eq. Pl.* § 312, and notes.

liam Pitts. — Clarke, the son of Player Clarke, returned to England after the decease of his uncle William Clarke : but, being in indigent circumstances, was unable to prosecute his claim to the estates of his uncle ; and soon afterwards went to sea again ; and died some time since unmarried, and \* intestate ; leaving the Plaintiff Mary Pitts his first cousin ; who on his death became absolutely entitled to one undivided moiety or half part of the said freehold estate. The Plaintiffs then stating, that the Defendants resist the Plaintiffs' claim, pretending, that William Clarke made a will in February 1781, devising to Robert and William Parfitt the elder, their heirs, &c. as tenants in common, and appointing them executors, charged, that Clarke was not of sound mind, &c. ; that the Will was not duly executed ; and was procured to be made to deprive the son of Player Clarke of his right ; that William Clarke was previously to his death at variance with Robert and William Parfitt ; and the Plaintiff, as one of the co-heirs of William Clarke, is entitled to a moiety of the estate ; praying a discovery of the several facts charged ; that the witnesses may be examined *de bene esse*, that their testimony may be prepared and recorded in Court ; and that the Plaintiffs may have the benefit of the same hereafter at law, or otherwise, as they shall be advised.

To this Bill the Defendants put in a demurrer ; alleging, for cause, that the Plaintiffs have not stated such a case as entitles them to such discovery.

Mr. Wilson, in support of the Bill, having cited the case of *The Earl of Suffolk v. Green* (1), was stopped by the Court.

Mr. Hart, for the Defendant, then offered to demur *ore tenus* to the examination of witnesses.

The Lord CHANCELLOR [ELDON].—A demurrer *ore tenus* must be to that, which the \* Defendant has demurred to [216] on the record. If the cause of that demurrer on the record is not good, he may at the bar assign other cause : but he cannot demur *ore tenus* upon a ground, which he has not made the subject of demurrer on the record (2). The consequence of such practice would have been, that before the course of demurring generally, where the Plaintiff was entitled to discovery only, was established (3), if a demurrer failed as to the relief, the Defendant might have had a demurrer *ore tenus* to the discovery. This Defendant therefore, not having demurred to the examination of witnesses, cannot now

(1) 1 Atk. 450.

(2) See 1 Anstr. 4, where Eyre, Ch. Bar. states, that a demurrer *ore tenus* is only allowed on new grounds ; not where a demurrer in paper on the same point has already been over-ruled ; *ante, Pyle v. Price*, vol. vi. 779, viii. 408 ; and as to costs, 1 Swanst, 288. Mr. Beames's Orders in Chancery, 174. On plea over-ruled, there being no demurrer on record, Defendant cannot demur *ore tenus* ; *Hook v. Dorman*, 1 Sim. & Stu. 227.

(3) *Ante, Gordon v. Simkinson*, vol. xi. 509 ; *Baker v. Mellish*, x. 544 ; and see the notes, 553 ; ii. 461 ; viii. 3.

at the bar demur to that, which he had not before made the subject of demurrer.

The Demurrer was over-ruled.

See the notes to *Renison v. Ashley*, 2 V. 459; and note 4 to *Rougemont v. The Royal Exchange Assurance Company*, 7 V. 304.

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SPEER v. CRAWTER.

SPEER v. TAYLOR.

[1810, August 9, 10, 21.]

COMMISSIONERS under an Inclosing Act, liable to suits at law and in Equity for acts, not according to their authority.  
Demurrer to a Bill upon that principle, charging, not collusion expressly, but that they were proceeding to divide unjustly, and not according to their authority, viz. upon the information of a tenant of the Plaintiff's Manor, being owner of the adjoining one; and the boundaries, and documents being intermixed, overruled.

Obligation of tenant to take care of the rights of his landlord, [p. 225.]

THE Bill in these causes stated, that the Plaintiff was lord of the manor of Weston in the country of Surrey, expectant upon the determination of a lease of thirty-one years from the 4th [\* 217] of March, 1784, vested \* in Robert Taylor, lord of the manor of Imworth, otherwise Imbercourt, adjoining to, and lying in part intermixed with the manor of Weston. The Plaintiff's father in 1801 became the purchaser from the Crown of the manor of Weston, subject to the said lease; but the manor of Imworth had been before granted out, and held, by private persons by virtue of such royal grant for several centuries.

The Bill farther stated, that for a long time past the persons, successively holding the manor of Imworth, have obtained the lease of the manor of Weston; and been in possession of both as owners of the former, and lessees of the latter; and by such union of possession for so long a period the Court Rolls of the manor of Weston, &c. had been delivered over to, and remained in the custody of, the predecessors of the Defendant Taylor, lords of the manor of Imworth, and are now in the said Defendant's custody, &c. as lord of the said manor; and since their being so held together the respective Rolls of the said manors have not been uniformly kept distinct, but blended and intermixed together; and from the greater interest the successive holders thereof have had in the manor of Imworth, particularly in the time of Taylor, the Rolls of that manor have been made the principal, or in many instances the only, record preserved of the acts, which took place in both the said manors; and the Courts of the manor of Weston have been neglected to be holden; that by

such means the tenants of the manor of Weston, of which formerly there were many, have been all transferred to the Rolls of Imworth ; and the boundaries of the said manors where they respectively join, or lie intermixed, have not been preserved ; and cannot now, it is alleged, without the aid of the Court, be ascertained, in the open wastes or commons, which are known to be at the extremity of each of the said manors, or to extend into both of them ; that, \* when the officers of the Crown were about to offer the [\*218] reversion of the manor of Weston to sale, they were unable to make out the survey without applying for information to Taylor ; from which information, and the Parliamentary and Crown survey, mentioned by him, a map was made ; which was delivered to the Plaintiff's father, when he purchased it ; and is now in the Plaintiff's possession.

The bills proceeded to state, that there is at the extremity of the manor of Weston a common or waste, containing between six and seven acres, but formerly larger, as appears by the Parliamentary survey, called Weston Green ; generally reputed to be within that manor ; and another more considerable tract of waste or common, containing three hundred and fifty acres, called Weston, or Ditton, Common ; which is known to extend into both the said manors ; and wherein the line of the respective boundaries thereof is not ascertained ; but, though the precise boundary may not be now known, the proportion or admeasurement of the quantity of land therein, belonging to the manor of Weston, has always been known or reputed at two hundred acres, part thereof ; and which is the waste or common nearest to Weston Green. By an act of Parliament, 48 Geo. III. for inclosing lands in the several manors of Kingston-on-Thames and Imworth, and for selling part of such lands for the purposes of the Act, reciting an Act, 41 Geo. III. for consolidating certain provisions, usually inserted in Acts of Inclosure, &c. the Defendants Crawter and Neale were appointed Commissioners for dividing, allotting, and inclosing, the lands therein mentioned, &c. ; with provisions, enabling the Commissioners under certain restrictions to hear and determine any disputes between the parties interested, or claiming so to be, in any of the lands, &c. to be affected by the Act, touching the rights \* such parties [\*219] had, or claimed in the same, or the allotments, or compensation to be made in lieu thereof, or any other thing relating to the division and allotment, directed to be made, &c. ; provided, that nothing in the said clause was to authorize the Commissioners to try the title to any messuages, &c. whatever ; and that any person interested, or claiming so to be, in the intended division, dissatisfied with the determination of the Commissioners, touching any claim of the right to the soil, might proceed to a trial at Law, &c. ; and the determination of the Commissioners touching any claim of the right to the soil of the open and common lands and waste grounds, and other rights and interests, in, over, and upon, the lands and grounds, thereby directed to be divided, &c. not objected to, or, be-

ing objected to, not brought to trial in such action, as aforesaid, was to be final and conclusive upon all parties: proviso, that no such difference, suit, or proceeding, nor any difference, &c. touching the title to any lands, &c. should impede or delay the Commissioners in the execution of the Act; but the inclosure should be proceeded in notwithstanding any such difference, &c.; and that nothing in the Act should enable the Commissioners to determine any right between any parties contrary to the possession of such parties; except in the case of encroachment within twenty years: but, if the Commissioners should be of opinion against the right of the person in possession, they were to forbear to make any determination thereupon, until the possession should have been given up, or recovered from such person by ejectment or other course of Law.

The Bill farther stated, that the Act expressly provided, that nothing therein should be construed to authorise the Commissioners to divide, allot, or inclose, or otherwise intermeddle with, [\*220] any commonable or waste lands, \* or grounds, while within the manor of Weston, in the parish of Thames Ditton; but that the said lands, &c., should be exempted from the powers and provisions of the Act; and by the former Act, 41 Geo. III. it is enacted, that Commissioners, appointed by any Act of Inclosure, shall, in case of dispute or doubt concerning the boundaries of parishes, manors, &c. by examination of witnesses on oath, or by such other legal ways and means as they shall think proper, inquire into the boundaries of such several parishes, &c. and, in case it shall appear to them, that the boundaries are not then sufficiently ascertained and distinguished, they are required to ascertain and determine the same; and after the boundaries shall be so ascertained, they are thereby declared to be the boundaries of such parishes, &c. before the time of setting out such boundaries; giving ten days' notice to the several parties in the said Act mentioned of the intention to set out and determine the same, and within one month after ascertaining and setting out the same boundaries causing a description thereof in writing to be delivered to the churchwardens or overseers of the poor, of the respective parishes, or the lords or stewards of the manors: Provided, that if any persons, interested in the determination, shall be dissatisfied, they may appeal to the Quarter Sessions within four months after publication of such boundaries: that decision to be final and not removable by *Certiorari*.

The Bill then stated, that the Defendants Crawter and Neale, the Commissioners appointed under the Act, acting, as they allege, in pursuance of the powers, given them with regard to the proposed inclosure of the commons and wastes of the manor of Imworth, proceeded to inquire into the boundaries thereof; to ascertain the limits of their jurisdiction; and for that purpose applied to the Defendant

Taylor; who, instead of preserving to the manor of Weston, [\*221] \* as in the character of tenant to the Plaintiff he ought, the proper boundary or known proportion of the said wastes or commons, where the manors adjoin, or intermix, formed a de-

sign to avail himself of the Inclosure Act, and the power of the Commissioners, to enlarge the freehold manor of Imworth at the expense of the manor of Weston ; and with that view pointed out to the Commissioners a line of boundary, including in the manor of Imworth the waste or common, called Weston Green ; the whole whereof was always known or reputed to belong to the manor of Weston ; and was by Taylor, his tenant, in the Plaintiff's undisputed possession, as part of the said manor ; and also including the whole of the waste or common, called Weston or Ditton Common ; whereof 200 acres in quantity was likewise known or reputed to belong to Weston manor, and also by his said tenant uninterruptedly possessed by the Plaintiff, as parcel thereof.

The Commissioners in December, 1808, met to set out the boundaries of Imworth manor ; and Taylor or his steward attended them ; and without examining any persons upon oath, or using any other means to come at the knowledge of the true boundary, save the assertion of Taylor or his agent, set out the intended boundary according to the line so pointed out by Taylor ; and thereby exceeded their jurisdiction ; and committed a trespass or trespasses upon the Plaintiff's manor : but the boundary, so marked out by them, has not been as yet published in the manner, directed by the General Inclosure Act. The Plaintiff, being prevented by the lease to Taylor from bringing any action against Crawter and Neale for the trespass, or against Taylor to recover the land, or otherwise trying his right, as lord of the manor of Weston, unless they would forbear setting up the lease, gave them notice, that the said common, called Weston \*Green, and the 200 acres of Weston or Ditton Common, are entirely out of their jurisdiction by express exemption from the Act, as being parts of the waste lands, situate within the excepted manor of Weston, or, if not, and the pretended boundary, so marked out, shall be persisted in, that then the Plaintiff, subject to the lease to Taylor, claimed the absolute right and title thereto, or was by his said tenant in the possession thereof ; requesting them to forbear their determination until the possession shall have been given up, or recovered by ejectment, or other course of Law ; to suspend all proceedings, and to forbear setting up the lease, &c. ; that a fair trial may be had ; the Plaintiff charging, that by the exception in the Act the Commissioners have in no case power to intermeddle with the waste of Weston manor ; that the powers, given to Commissioners by the General Inclosure Act with regard to the boundaries, are given only in case of disputes or doubts concerning such boundaries ; and no dispute or doubt was ever made respecting the waste, called Weston Green, being part of the manor of Weston, nor with regard to the quantity of 200 acres out of Weston Common ; though the precise site of those parts may not be ascertained ; that the Defendants did not examine witnesses, &c. that they neglected to publish any description in writing, as required by the Act ; thereby preventing an Appeal to the Quarter Sessions ; that irreparable damage will be the consequence, if they proceed in the in-

closure of such parts: viz. by breaking the soil, &c.; that the clause, directing, that no difference or dispute shall impede the Commissioners, is referrible only to such premises as are by the Act directed to be inclosed; not to premises within the exception; that the Court Rolls, &c. of the manor of Weston being in the hands of Taylor, as lessee, or blended with the rolls of the manor of Imworth,  
 [\* 223] the Plaintiff cannot obtain proper evidence to go to trial, or even to appeal, without a discovery and production, &c.

The Bill prayed, that Taylor may discover all the matters aforesaid; and that the Plaintiff notwithstanding the lease may be at liberty to bring actions of trespass against Crawter and Neale, and of ejectment against Taylor; that a Commission may issue to set out the land, which lies within, and is part of, the manor of Weston; and that the Defendants may be respectively restrained from setting up the lease: or that one or more issues may be directed to try the Plaintiff's right to the premises; and that the Commissioners may in the mean time be restrained from proceeding.

The Defendants, Crawter and Neale and Taylor, severally put in demurrers for want of equity.

Mr. Hart, Mr. Johnson, Mr. Martin, and Mr. Bell, in support of the demurrers.—This is not the subject of equitable jurisdiction. A public duty is imposed upon the Commissioners by this Act of Parliament; prescribing the manner, in which the powers, given to them, are to be exercised; by a literal compliance with which only they can protect themselves against actions of trespass. The effect of the Plaintiff's statement is, no more than that under the pretence of right they are about to commit a trespass by an act, not warranted by the Act of Parliament. If that is so, he has a remedy at law by a special action on the case for the violation of his rights under the pretence of authority by an Act of Parliament: but, if he has not that remedy, there is no jurisdiction in equity; and great mischief will follow from admitting such a Bill. The effect will be,  
 [\* 224] if not to supersede, to suspend, the General \*Inclosure Act (1); the object of which was to prevent suits of this kind; providing the particular mode of division; and the means of forming a correct judgment as to the boundaries; and excluding any Appeal from the judgment of the Commissioners, except to the Quarter Sessions. Though they may be amenable to the Court of King's Bench for a corrupt or negligent exercise of their powers, this Court cannot supersede the authority, given to them by the Act.

Mr. Richards, Sir Samuel Romilly, and Mr. Wilson, for the Plaintiff.

The Lord CHANCELLOR [ELDON].—The first consideration in this case is, what are the remedies at law against Commissioners, acting in execution of a public duty, imposed on them by an Act of Inclosure; and according to my view of this subject, Commissioners, not acting in the mode and form, directed by the Act of Parliament, would be

liable to the interposition of Courts both of Law and Equity ; unless the Act contains a clause, protecting them against such interposition. Since the introduction of the different clauses, at different times, into bills of this sort, the interposition of Courts of Law and Equity has never been excluded, where the persons, to whom authorities are given, are acting not according to their authority, and in the manner, prescribed by the Act. There cannot therefore be much doubt, that, if these Commissioners executed their duty in any other mode than that prescribed, equally beneficial, but not the mode directed, they would be liable to an action.

On the other hand the very peculiar situation of \*the Plaintiff, as represented by these Bills, must be taken into consideration ; with reference to which this is a case the Legislature, giving the powers, contained in this Act, could not have had in contemplation ; but, if those powers are given in the extent, that has been contended, the Plaintiff must submit to the inconvenience ; which upon that hypothesis is not to be represented as an injury. Taylor, being Lord of the Manor of Imber Court, stood also as tenant to the Plaintiff, Lord of the Manor of Weston, in a relation imposing on him a solemn obligation to take equal care of the rights of his landlord and his own (1) ; and the allegations of the Bill with regard to his conduct, not carrying it to the extent of fraud, are, that the documents of the Manor of Weston are to be found in the Court Rolls of Imber Court ; and that the effect of what has been done under this Inclosing Act is, that a large proportion of land, the site of it unknown, has in some way been lost to the Manor of Weston ; and all this by the conduct of Taylor.

If this Act of Parliament had not passed, there is no doubt, that under such circumstances a Court of Equity would have interposed as between the Plaintiff and Taylor ; and, if the Act of the Commissioners is final, as it is represented to be, and perhaps would be, if regular, it must be lamented, that the Equity, which would otherwise have been administered, cannot be interposed. It is said, these are public functionaries ; with reference to whom there is no equitable jurisdiction : but that proposition must go to this extent ; that, if Taylor had not been Lord of the Manor of Imber Court, and had been faithful to his duty, as tenant, and these Commissioners not pursuing the Act of Parliament, had gone upon the manor in his possession, he could not have brought an action of trespass. It is material to see, how that would have stood at Law ; as I conceive, \*if such an action could have been maintained, [ \* 226] all the inconvenience of suits would follow ; having no conception, how the equitable jurisdiction, which in a case of any other description the peculiar circumstances would let in, is to be excluded.

It is true, there is no express charge of collusion between Taylor

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(1) *Ante, The Duke of Leeds v. The Earl of Strafford*, vol. iv. 180 ; see the note, 186.

and the Commissioners; that he gave them license, to prevent any action in his name; or, that he will not permit his name to be used: but the question is, whether this Bill does not state enough to show, that an action, if brought in Taylor's name, would be disappointed on the ground, that he had given his license. It is said, an action on the case would lie on account of the injury to the reversion; and I incline to think so: but, admitting that, and that such an action could not be met by the defence of license, I doubt, whether the Equity would be excluded; as, if the Commissioners are exceeding their authority by carrying the soil of Weston into the boundaries of Imber Court, mere damages in trespass or case for the injury to the reversion is not the relief, to which the party is entitled. He is entitled to insist, that this is part of his manor; which he has a right to keep; until it is taken from him by a proceeding, to be considered judicial, in the manner, authorised by the Act. The question is, whether upon the whole the Plaintiff does not state, that part of that, which belongs to the manor of Weston, is about to be withdrawn by a proceeding, not sanctioned by the Legislature; open to all the remedies at Law and in Equity, of which the Plaintiff might have availed himself, if this Act had not passed. However the Law may have been altered of late with regard to Actions and Suits in Equity by these general Acts of Inclosure, I recollect such [ \* 227 ] Actions and \* Bills successfully maintained. I shall look at this Act and the Bills, before I give judgment: but at this moment I cannot allow these Demurrsers.

1810, Aug. 21st. The Demurrsers were afterwards over-ruled.

1. THAT equity will, in certain cases, interfere to give relief, by issuing a commission, when it appears that a legal right would otherwise be lost in consequence of a confusion of boundaries; but that such relief will be given only when some equity has been superinduced by the acts of the parties whose duty it was to keep the boundaries distinct: see note 2 to *Strode v. Blackburne*, 3 V. 222.

2. The demurrsers put in to the bill brought in the principal case, being overruled, answers were filed, and the case was brought to a hearing, as reported in 2 Meriv. 410, 416.

LANGSTON, *Ex parte* (1).

[1810, AUGUST 15.]

EQUITABLE mortgage by a deposit of deeds (*a*) ; covering subsequent advances upon evidence, that they were made upon that security.  
 Equitable mortgage by a deposit of deeds upon an advance of money without a word passing, [p. 230.]

THE Petition of Langston and Co. bankers, stated, that on the 13th of June the petitioners, who had been the bankers of Joshua and Edward Knight, carrying on business in partnership as corn-factors, at the request of Edward Knight, the surviving partner, advanced 4000*l.* on account of the partnership above the amount of their property in the hands of the petitioners ; relying on their credit, and on the faith of Knight's assurances, that the advance should be covered the next day ; and on Wednesday, the 14th of June, the petitioners received 1800*l.* ; and in the evening of that day Knight, with Henderson, the executor of Joshua Knight, and Gillies, their friend, called on the petitioners ; and represented to Boycott, one of them, that they were safe as to any money, advanced to the firm of Knights ; at the same time paying 2200*l.* by drafts of Henderson and Gillies upon their bankers : Henderson stating, that the petitioners would be perfectly safe in any accommodation they might give on account of the Knights ; as Joshua had left considerable funded property ; which would be sold, as soon as probate could be obtained, for the purpose of any \*advances, which the petitioners might make in the interim : [\*228] Knight said, he had 900*l.* to pay the next day, which he hoped Boycott would honor ; which he promised ; expressing a wish at the same time for some collateral security, to justify him to his partners ; upon which Knight immediately proposed to send to the petitioners the leases of their warehouses at Horseley-down, which he stated to be worth at least 8000*l.*, in order that the same might be left and deposited with the petitioners as a security for their advances on account of Joshua and Edward Knight ; which proposal was agreed to by Henderson.

The Petition farther stated, that the petitioners, being thus fully satisfied of the solidity of the firm, paid a draft accordingly in favor of Gillies for 921*l.* 3*s.* 1*d.* On the 15th of June, Henderson called ; and stated the situation of the Knights ; showing a written state-

(1) 1 Rose's Bankrupt Cases, 26.

(*a*) Owing to the system of Registration, the questions arising from the deposit of title-deeds are of less importance in the United States than in England. See *ante*, note (*a*) *Ford v. Petring*, 1 V. 72.

As to the Equitable mortgage, see *ante*, note (*a*) *Ex parte Coming*, 9 V. 115 ; note (*a*) *Ex parte Welherell*, 11 V. 398 ; 4 Kent, Com. (5th ed.) 150, *et seq.* ; 2 Story, Eq. Jur. § 1020, and notes ; *Keys v. Williams*, 3 Y. & C. 55, 61 ; *Manderille v. Welch*, 5 Wheat. 277, 284 ; *Paine v. Smith*, 2 M. & Keene, 417 ; *Russel v. Russel*, 1 Bro. C. C. (Am. ed. 1844,) 269, 270, and notes.

ment, viz. 20,000*l.* stock ; saying, that Joshua Knight had left besides considerable property, about 25,000*l.*, out of business ; giving otherwise a very favorable account of the circumstances of the partnership ; adding, that he had himself lent them 1200*l.* ; and would lend them more, if convenient to him ; and Knight brought the leases ; which Knight in the presence and with the approbation of Henderson delivered to Cazalet, one of the petitioners, as a security for the advances, which they might make on account of the firm of Joshua and Edward Knight : Henderson stating, that it would be necessary to provide for their drafts until the Monday or Tuesday following ; when the probate would be ready ; and the stock should be positively sold to replace any sums the petitioners might advance. On the 16th of June, Knight represented to the petitioners, that 5000*l.* would be necessary for the payments he should want to make that week ; and the petitioners accordingly advanced 5000*l.* upon the faith of the assurances [\* 229] and securities aforesaid. On Saturday the 17th of June about four in the afternoon Knight called again, desiring to have 2000*l.* more ; which he assured the Petitioners should certainly be repaid on Tuesday the 20th of June ; as Henderson had actually sold stock ; which would be transferred and paid for on that day, to the amount of 5000*l.* The Petitioners at first refused : but on Knight's solemn assurance, that it would be repaid on Tuesday, or, even in case it should not, that the security in the hands of the Petitioners was worth from 7000*l.* to 8000*l.* and therefore at all events they must be secure in such advance, they advanced 2000*l.* in full confidence, that the security, which they held, as aforesaid, would protect them ; relying also on the assurances they had received from Henderson as to the solvency and property of the parties and the repayment of their advances on the following Tuesday.

The Petition farther stated, that, no provision being made for the repayment, the Petitioners on Tuesday the 20th of June required from Henderson and Knight, that Knight, in whom, as surviving partner, the leasehold premises were vested, should give the Petitioners a confirmation of their security upon those premises for the whole of their advances ; upon which a memorandum, dated the 20th of June, was signed by Knight ; stating, that on the 14th of June, Knight with the consent of Henderson, executor of Joshua Knight, deposited with the Petitioners the title-deeds, &c. as a security to them for the sum of 4000*l.* which Langston and Co. then advanced and paid for the said firm, and on the security whereof other and farther advances have been since made by Langston and Co. to and on account of the said firm, amounting to the farther sum of 3300*l.* ; and Knight agreed to charge and subject the said title-deeds and premises with the payment of the moneys aforesaid, and \*interest ; and also to make such farther security thereon for the said moneys and interest as Langston and Co. should require, "and which the said Edward Knight doth hereby ratify and confirm."

On the 23d of June a Commission of Bankruptcy issued against Knight on an Act of Bankruptcy committed on the 20th. The Petitioners claimed an equitable lien for the whole of their debt; stating also, that 1200*l.* part of the farther advances, was borrowed to repay that sum, which had been lent by Henderson; who on the 14th and 15th of June had reason to alter his opinion as to the affairs of Knight; and had then determined not to sell the stock, as executor; and that the representation in the memorandum, that the deposit was made as a security for the sum of 4000*l.* was at the instance of Henderson.

The prayer of the Petition was, that the money, produced by the sale of the premises, which had taken place by agreement, may be paid to the Petitioners; and that they may be admitted to prove the residue of their demand under the Commission. The statement in the memorandum of the 14th of June, as the date of the deposit, was admitted to be a mistake.

1810. Aug. 15th. The Lord CHANCELLOR.—If this paper, dated the 20th of June, the day, on which the Act of Bankruptcy was committed, contains nothing, that is not consistent with the present representation of these creditors, that circumstance, though it will not effectually confirm their representation, cannot possibly have any effect to their prejudice. It has been long settled, that a mere deposit of title-deeds upon an advance of money, without a word passing, gives an equitable \*lien (1); and, as the Court [\* 231] would infer from that deposit, that the money, then advanced, should be charged, as if there was a written agreement, there is no doubt, that, if it was made out by oath uncontradicted, additional advances would also be charged. It is not probable, that a person, having made an advance upon a security, which he holds, should make farther advances without security. The Petition states the conversation, when the last advance, of 2000*l.*, was made: Knight, after his solemn assurance, that it would be repaid on Tuesday, adding, that in case it should not, the security in the hands of the bankers was worth from 7000*l.* to 8000*l.*; and therefore at all events they must be secure in such advance: a representation of the borrower, that the person lending would be safe in all events upon the security he held; and the advance upon the confidence of that representation is surely equivalent to an express agreement, by parol at least, that, if he did advance, he should hold the security for the amount. Then, no provision being made for repayment, the creditors call for a confirmation of their security, and an instrument is signed, which on the face of it is perfectly consistent with what is sworn; not only stating, that the advances were made on the security of the premises, but purporting to be a ratification. Then, this being sworn positively,

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(1) *Ante, Ex parte Mountfort*, vol. xiv. 606, and the references in the note, ix. 117, *Ex parte Coming*.

and without contradiction, I am perfectly satisfied, that the Petitioners are entitled to hold this security for their debt (1).

The Order was made according to the prayer of the Petition (2).

1. ANOTHER report of this case may be found in 1 Rose, 26.

2. See, *ante*, the notes to *Ex parte Coming*, 9 V. 115, with respect to the doctrine of "equitable mortgage."

[\* 232]

## BLUNDELL v. BRETTARGH.

[1810, JUNE 29, 30.]

SPECIFIC performance refused under a contract for sale at a price, to be fixed by arbitrators within a certain time, or if they should not agree to make their Award within the time, by an umpire, also within a limited time; the construction of the contract, requiring the delivery of the Award in writing to each party, being, that, though the consequential acts, executing the conveyances, &c. might be done by representatives, it was with reference to the terms, to be fixed by the Award, personal to the parties; one of whom died before it.

Objection to an Award, to be ready to be delivered in writing, to the parties by a certain day, as not having a deed-stamp, over-ruled.

Under a contract for Sale at a price, to be fixed by an Award within a limited time during the lives of the parties, the death of one is not an accident, against which the Court will relieve (a), [p. 241.]

If the terms of an agreement are to be ascertained by an Award, being so ascertained, it shall be specifically performed, if any thing is to be done in *specie*: conveyances, &c. not, if the acts, done towards executing it by an Award, are not valid at Law as to the time, manner, or other circumstances, unless there has been acquiescence, notwithstanding the variation of circumstances, or part-performance, [p. 241.]

No case at Law or in Equity, that, if an Award is not made at the time and in the manner stipulated, the Court have substituted themselves for the arbitrators; and made the Award; even where the substantial thing to be done was agreed by the parties, but the time and manner left to others to prescribe (b), [p. 242.]

No instance, where, the medium of arbitration for settling the terms of a contract having failed, this Court has assumed jurisdiction to determine, that there is a contract, though not at Law, in Equity; which, though the parties never agreed to it, shall be specifically executed, [p. 243.]

By indentures, dated the 9th of April, 1803, Edward Brettargh covenanted with the Plaintiff, his heirs, executors, administrators,

(1) *Ex parte Lloyd*, 1 Glyn. & Jam. 389.

(2) An equitable mortgage is not within the General Order, 8th March, 1794; *Ex parte Payler*, *ante*, vol. xvi. 434.

(a) 1 Story, Eq. Jur. § 103. The same rule applies, where there is an express covenant to pay rent during a term. It must be paid, notwithstanding the premises are accidentally burnt down during the term. Ib. § 102; *Fowler v. Bott*, 6 Mass. 63; *Hallet v. Wylie*, 3 Johns. 44.

(b) As to reference of price to the arbitration of third persons, *Brown v. Bellows*, 4 Pick. 189; *Long on Sales*, by Rand, 5; 1 Stair, b. 1, t. 14. The Court will not undertake to perform the duty intrusted to them, so that, if they do not fix thereon, the price being an essential part of the contract, the agreement must fail. *Jeremy*, Eq. Jur. 442.

and assigns, that he, Brettargh, his heirs, executors, administrators, and assigns, should and would, as soon as conveniently might be after the arbitrators therein appointed, or their umpire, should have made their award, as after mentioned, make a good title to, and grant, sell, release, and convey, at such consideration, price, or sum of money, as the said arbitrators or their umpire should fix, the fee-simple and inheritance of a messuage, with land thereto belonging, in Ince Blundell, containing four acres, two rods, twenty-one perches; to the use of the Plaintiff, his heirs and assigns for ever; and also to grant, assign, and surrender, for such consideration, &c. as the said arbitrators, &c. should fix, other premises, called Ballard's Tenement, twenty acres, two rods, twenty-five perches, and The Paddock, three rods, nineteen perches; and the Plaintiff Henry Blundell covenanted, that he, his heirs, executors, administrators, and assigns, would, immediately after performance of the covenants, and agreements, therein before contained on the part of Brettargh, his heirs, executors, &c. and upon he or they surrendering up to be cancelled all former indentures of lease, before granted by the Plaintiff or any of his ancestors to Brettargh or any of his ancestors, of all or any part of the premises therein described, for such consideration, \* price, or sum of money, [\*233] and under and subject to such sum or sums of money, as a yearly reserved rent or rents, as the said arbitrators or their umpire shall award, that the messuages, tenements, lands, and hereditaments in Lydiate, therein described, and the term, estate, and interest, agreed to be granted by the Plaintiff, as after mentioned, should exceed the value of Ballard's Tenement and The Paddock and the term, estate, and interest, agreed to be granted and surrendered by Brettargh, as aforesaid, grant, demise, &c. to Brettargh, his heirs and assigns, all that messuage or tenement and the several closes, (describing them) containing eighteen acres, twenty-nine perches, and other premises, to Edward Brettargh, his heirs and assigns, for lives, as therein mentioned; and for carrying the said agreement into execution it was declared, that the real value of the messuages, lands, &c. agreed to be granted, sold, or surrendered, respectively by Brettargh, his heirs, executors, &c. to the Plaintiff his heirs and assigns, in manner aforesaid, and of the messuages, lands, &c. agreed to be granted and demised by the Plaintiff, his heirs, executors, &c. to Brettargh, his heirs and assigns, in manner aforesaid, should be found, ascertained, fixed upon, and settled, by James Leigh and Daniel Alty, as arbitrators to award, order, adjudge, and determine, concerning the value of the premises aforesaid; and in case such arbitrators could not agree in the premises, then such worth and value should be found, &c. by such persons as the said arbitrators should choose for umpire, to award, &c. concerning the premises; and that the award of the said arbitrators, provided the same was made in writing under their hands and seals ready to be delivered to each party on or before the 1st of July then next, or in case, the said ar-

bitrators should not agree to make their award in the premises without in the time limited, as aforesaid, then the award of such [\*234] umpire, provided the \*same was made in writing ready to be delivered to each party on or before the 1st of October, should be final and conclusive to both the said parties, respectively, and their respective heirs, executors, &c.; and it was declared, that the said arbitrators or umpire, as the case might happen, should award, &c. by whom and in what manner the costs of the said indenture, and all other costs, charges and expenses, of carrying the said indenture into execution, or in any manner incident or relating thereto, or occasioned thereby, should be paid; and the Plaintiff farther covenanted with Brettargh, his heirs, executors, &c. that the Plaintiff, his heirs, executors, &c. would pay to Brettargh, his executors, &c. all such sum and sums of money as the messuages, lands, &c. agreed to be granted, sold, and surrendered by Brettargh, should exceed the value of the messuages, lands, &c. intended and agreed to be granted and demised by the Plaintiff to Brettargh, his heirs, and assigns, as aforesaid, after settling the reserved rents; and Brettargh covenanted, that he, his heirs, executors, &c. would pay to the Plaintiff, his executors, &c. all such sum and sums of money as the messuages, lands, &c. intended and agreed to be demised to Brettargh, his heirs and assigns, &c. should exceed the value of the lands, &c. surrendered, &c.; and for the due performance of the said indentures and of the award the parties did bind themselves, their heirs, executors, &c. in the penalty of 2000*l.*

The bill prayed a specific performance against the executors and devisees in trust of Brettargh; who died on the 20th of June, 1802; according to the award, bearing date the 10th of June; determining the value of the various premises, the rents, to be reserved, &c.; stating the result, that the excess, to be paid by the Plaintiff to Brettargh, was 575*l.*; which sum the arbitrators awarded to be

paid by the Plaintiff, his heirs, executors, or administrators, [\*235] \* to Brettargh, his heirs, executors, administrators, or assigns, on the 11th of November next, at, &c.: the demises and conveyances, &c. to be mutually executed by the Plaintiff and the said Edward Brettargh, or their heirs, executors, or administrators, respectively; and the costs to be borne by them equally.

The Answer, objecting to the award on the ground of partiality in the arbitrators, undervaluing the estates of Brettargh, submitted, that it was void.

Leigh, one of the arbitrators, by his depositions stated, that the award was executed by him; and, as he thinks, before Brettargh's death. They agreed upon it on the 2d of June; and reduced it to writing, as instructions; but does not recollect their signing it. Alty, the other arbitrator, took the minutes with him; to deliver to an attorney, to draw out. They were in substance what the award is. A few days afterwards the attorney's clerk brought the deponent the award to sign. It appeared to be signed by Alty; and varied from

the minutes: a sum of 100*l.*, charged on Brettargh's estate, to be conveyed to the Plaintiff, being directed to be paid off: whereas they meant only, that the interest should be paid; or that the Plaintiff should be otherwise indemnified. On that account the deponent declined signing. Three days afterwards the Clerk brought him the award, altered in that respect; which he executed; but does not recollect, whether Alty had signed it, or not.

Alty by his depositions stated, that they agreed upon an award on the 10th of June. On the 14th of May they went over the premises, field by field; and fixed upon the value. On the 2d of June they met to fix upon the terms of their award; and fixed the value. He does not recollect, who gave instructions for the award: it was prepared by Wright, an attorney. \* On the 10th of [\* 236] June the deponent believes he signed it. On the 23d, upon his return home he found a letter from Leigh as to the mistake. On the 24th the deponent executed another deed; setting that right. This award had been previously signed by Leigh.

The award was proved by the Clerk of the attorney; stating, that it was signed by Leigh on the 24th of June. It was executed, after it bears date. On the 10th of June the deponent engrossed on a stamp the award from the draft produced. Afterwards Wright, to whom he was clerk, desired him to make the copy, with alterations, (Exhibit F.) He afterwards engrossed another award, from the said copy, (Exhibit B.) without date. He inserted in the engrossment, as the date, the day, on which he finished it: but, referring to the back of the copy, he found it dated the 10th of June, 1802. He therefore erased the first, and put in the latter date; as it now appears; which alteration was previous to Leigh's execution; who executed before Alty. It was subsequent to the 10th of June; but on what day the deponent cannot state; except that he believes, it was on or previous to the 24th of June. This and no other he believes to be the true reason of the award being dated on another day than that, on which it was executed.

An objection was taken to the award; as not having the stamp, required for a deed; though it was executed as a deed.

The Lord CHANCELLOR [ELDON] over-ruled the objection; observing, that the award was to be by a writing under hand and seal: which, when signed and sealed, was constituted an award; and delivery, which is of the \* essence of a deed, was not [\* 237] necessary to make this instrument an award.

Sir *Samuel Romilly* and Mr. *Bell*, for the Plaintiff.—This is in effect an agreement for an exchange of estates according to the valuation of persons, appointed by the parties; which this Court will carry into execution notwithstanding the death of one party: every thing substantial having been previously completed: the judgment of the arbitrators exercised; and out of the reach of any influence from that subsequent accident. This case is not within *Milnes v. Gery* (1); where the Master of the Rolls, following the opinion of

your Lordship in *Cooth v. Jackson* (1), decided, that the valuation of the whole subject of the contract by the persons, appointed for that purpose, failing, that defect could not be supplied by this Court; a rule, which is not to be considered as extending to subjects of less importance; for instance, the valuation of fixtures. The right of this Plaintiff to the benefit of his contract depends upon the common principle of specific performance; every thing substantial being done. The objection to the valuation cannot be introduced without showing improper conduct in the arbitrators.

Mr. *Hart* and Mr. *Leach*, for the Defendant.—If this contract cannot be enforced at law, this Court will not perform it under the circumstances established by the evidence; proving the great injustice of this award by appreciating the estate of the Defendant at little more than a moiety of its value. Whether that is produced by fraud, by mistake, accident, or any cause, short of fraud, [\* 238] \* a Court of Equity will not give it effect. The award was not executed on the day it bears date: and when it was really executed, one of the parties, upon whom it imposes obligations, was not in existence. The accident of his death has as much effect as the death of the arbitrators, or, as in *Milnes v. Gery*, their refusal to act. The award cannot bind the heir. There is no mutuality. Brettargh, if it had been favorable to him, could not have had the benefit of it. The execution on a particular day is as much an integral part of the award as the valuation. The period, within which the authority of an arbitrator is to be exercised, was never held to be immaterial. Considering it as defeated by mere accident, the agreement of the parties exposed them to that by an accident, to which it was from its nature subject; and if on that account the award is not binding at law, this Court will not act upon it.

Sir *Samuel Romilly*, in reply.—The case of *Milnes v. Gery* has no reference to this. The substantial part of that contract could not be executed. The valuation was left to particular individuals on account of the confidence the parties had in their integrity and knowledge. There was no contract, that the Master should ascertain the value; and the Master of the Rolls distinctly puts it upon that ground, that by making the Decree he should execute a contract, perfectly different from that, which the parties entered into. The particular day may certainly be material in some respects; with reference, for instance, to value at a particular time. If this had been an award, in a strict sense, to settle disputes, then the parties, not being bound at law, would not be bound in equity: but, whatever terms are used, it is merely a reference to settle the value.

[\* 239] The agreement is in substance to sell at the actual value: that what the persons named, or the umpire shall ascertain to be the value, shall be paid by the parties, or their representatives; who are to make the conveyance, as soon as conveniently can be after the award; which shows their contemplation, that the

value might not be ascertained before the death of one of the parties.

The Lord CHANCELLOR.—The time must be substantial in this instance ; as after the 1st of July another individual is to be brought in ; and, if the time is essential as to the two arbitrators, it must be so as to the umpire also. I do not at present see my way to decree a specific performance : but I will look at the case, that has been cited.

1810. June 30th. The Lord CHANCELLOR [ELDON].—In stating the language of this contract I mark the uniform use of the words "heirs, executors, administrators, and assigns :" but it is a contract by and between the parties, that is, the two individuals, contracting for themselves, their heirs, executors, administrators, and assigns, that the value, to be paid for the premises, should be ascertained by the award of the arbitrators appointed ; to be made in writing under their hands and seals, ready to be delivered to each party on or before the 1st of July ; or, in case they should not agree to make their award, and therefore the umpire was to fix the value, by the 1st of October. An award was actually made on the 24th of June ; bearing date the 10th : and the material fact is, that one of those, whom I shall for the present purpose call, in the terms of the execution, "the parties to these presents," died between the 10th and the 24th, and the award therefore was not made until after his death.

\* With regard to the objection, that this award cannot [<sup>\*</sup> 240] be read, as it is not upon a deed-stamp, the question whether that is necessary, may perhaps, notwithstanding a decision of the Court of King's Bench, admit some doubt ; as an award may be delivered without being in writing ; but if it is to be delivered in writing, on a day certain, more especially if the expression is, that it shall be ready to be delivered, though the contract might require, that it should be delivered as a deed, the mere circumstance that it is in writing, will not make it a deed. Supposing that not maintainable, on paying the penalty I think this point would not entitle the party to say, it was not an award on the 1st of July ; if the case turned on that.

Another ground taken is, that gross partiality is manifested by an under-value in so great a degree, that a Court of Equity ought to interfere. It is very difficult to make that out. It must go this length ; that this was not in a fair sense a valuation ; and, when that ground is taken, it must be considered as applied to the case of a contract, that an award shall be made.

The principal objection however, (to put the case as high as can be) is this ; that previously to the death of this person, the arbitrators had in a sense made up their minds ; but their award was not actually made until after his death : and under those circumstances the question is, whether here is any contract, the terms of which were ascertained during the lives of these parties : that is, an agree-

ment between them, that will bind those, who are entitled after their deaths : or, whether this is not an agreement to sell at a price, to be fixed by an award, or umpirage ; at such a price as they, the arbitrators or umpire, should within a given time, during the lives of the parties, appoint ; and no agreement, if neither the arbitrators [\* 241] nor the umpire fixed the price. Such an agreement cannot be carried into execution, if it has failed by the death of one of the parties ; which cannot be considered as an accident, against which this Court would relieve.

With regard to the opinion, expressed in the case of *Cooth v. Jackson* (1), followed by *Milnes v. Gery* (2), the terms of an agreement are to be ascertained by an award, being so ascertained, that agreement shall be performed in Equity, if there is any thing to be done *in specie* ; as estates to be conveyed, &c. : but I have not met with any authority, proving, that where parties have contracted, that the value of their respective interests shall be ascertained by arbitrators, or an umpire, if the acts, done by those persons for the purpose of carrying that agreement into effect by an award, are not valid at Law, as to the time, manner, or other circumstances, this Court will specifically perform that agreement : unless there has been acquiescence, notwithstanding the variation of circumstances ; or the agreement, evidenced by such an award, has been part-performed ; and upon a review of the cases I do not find any reason to alter that notion, which I had of the general doctrine.

I see, that in *Cooth v. Jackson* I stated (3), that I was [\* 242] not \* aware of any case even at Law, nor that a Court of Equity had ever entertained this jurisdiction ; that, where a reference has been made to arbitration, and the judgment of the arbitrators is not given in the time and manner, according to the agreement, the Court have substituted themselves for the arbitrators, and made the award ; that I was not aware, that this had been done even in a case where the substantial thing to be done was agreed between the parties ; but the time and manner, in which it was to be done, was that, which they had put upon others to execute : I should rather have said, "to prescribe." That was adopted by the Master of the Rolls in *Milnes v. Gery* (4).

The question now before me is, whether this is, or is not, a contract of that sort. I admit the full effect of the repeated occurrence of the words "heirs, executors, and administrators :" but, if the whole instrument shows, that the terms were to be settled by an award, to be delivered to the parties, the only way of considering it is, that they were contracting for themselves, their heirs, executors, &c., that they themselves shall execute all acts, as such award, so delivered, shall prescribe ; or, if they do not live long enough, after the terms have been so settled, that their heirs, executors and ad-

(1) *Ante*, vol. vi. 12.

(2) *Ante*, vol. xiv. 400 ; v. 849, and the note.

(3) *Ante*, vol. vi. 34.

(4) *Ante*, vol. xiv. 400.

ministrators, shall execute. I collect that inference, first, from the nature of the acts, required to be done, in order to settle the terms of the contract. If the mode and means of settling the terms are an award and umpirage, the terms must, unless otherwise contracted, be settled, while the parties are living; as the death of one has the effect of a revocation of the power to make the award. Then is there any declaration against that inference from the nature and quality of the Act, by which the terms and nature of \*the contract are to be settled? On the contrary in the [ \* 243] passage, by which they bind themselves, it is by the description of "parties to these presents;" and, speaking of the persons, to whom the instrument is to be delivered, it is to be delivered to "each party."

Then was there a part-performance or acquiescence? There is nothing of that sort. It is clearly admitted, and there is no doubt, that this instrument is void at Law: the contract being, that acts shall be done according to the award of arbitrators, to be made within a given time; which cannot be extended from the clause, by which, if the arbitrators do not agree to make their award, an umpire shall determine, also within a given period: those acts to be done by the parties; one of whom is dead; the terms not having been so settled. There is no instance, where the medium of arbitration or umpirage, resorted to for settling the terms of a contract, having failed, this Court has assumed jurisdiction to determine, that, though there is no contract at Law (1), there is a contract in Equity; and this Court will specifically execute that contract, to which the parties never agreed. My judgment therefore is, that this Bill cannot be supported.

1. In the report of the principal case, Lord Eldon is represented as having declared, that "delivery, which is of the essence of a deed, is not necessary to make an *instrument* an award." In *Cable v. Rogers*, however, (3 Bulstr. 312), the Court of King's Bench unanimously determined, that an award in writing is not completely made before it is delivered up: but in the case cited, as well as in the principal case, it was held to be clear, that writing is not essential to the validity of an award, unless that has been specially made one of the terms of the submission to the reference. And, where an award is made verbally, the *date* thereof must be referred to the time when it was *so given*. It may be observed, that Chief Baron Davenport thought it impossible a verbal award should be good where there was more than one arbitrator, because it could not be jointly pronounced: *Lawson's case*, Clayton's Rep. 17.

2. An award, made on an improper stamp may, at any time before an application to enforce it, be rendered a valid instrument by procuring the proper stamp, and paying the penalty attaching in such cases: *Preston v. Eastwood*, 7 T. R. 96.

3. That, where a personal confidence appears to have been reposed in certain named arbitrators, should they decline or become unable to make an award, the Court of Chancery will not be disposed to assume their office, see note 2 to *Emery v. Wase*, 5 V. 846, with the farther reference there given. And that the terms of an award must be settled whilst both the parties who submitted to the reference are living, see note 7 to *Mitchell v. Harris*, 2 V. 129.

4. The grounds upon which contracts respecting real estate have been held to be taken out of the operation of the Statute of Frauds, are not to be extended;

requires, that they should have proved for the benefit of him, advancing that sum of money to them ; and, if they cannot now prove, the obstacle is simply an objection of form ; that he handed over the money to them, when they had not actually proved. Sub-  
[\* 247] substantially, the Petitioner is to be considered \*as having purchased all their remedies. Upon the fair construction of the Act therefore, the Petitioner must be admitted to prove in their names, in respect of the money he paid them, notwithstanding any dividends already made.

The Order declared, that the judgment must be considered as a security for the original debt ; and, therefore, the Petitioner should be admitted to prove a debt of 1372*l.* 12*s.* 10*d.* ; and receive dividends, not disturbing any dividend already made.

1. This case is also reported in 1 Rose, 4.

2. When a person liable for the debt of a bankrupt discharges the demand, he is entitled to the benefit of such proof as the original creditors have made under the commission ; and, if they have not proved, he may : see, *ante*, note 2 to *Ex parte Matthews*, 6 V. 285.

### DETASTET, *Ex parte* (1).

[1810, APRIL 18; AUGUST 17.]

JOINT creditor, taking out a separate Commission of Bankruptcy, may prove, and receive Dividends, with the separate creditors ; though, as to part, a Trustee for another joint creditor ; who, upon the general rule, could have proved only to affect the Certificate, not to receive Dividends.  
Commission of Bankruptcy in nature of an execution, [p. 251.]

THIS Petition, presented by the assignee under a Commission of Bankruptcy against James Corson, stated, that on the 21st of September, 1807, a separate Commission of Bankruptcy issued against Corson, on the Petition of Bruce and Warren ; who were joint creditors of Villegille, Corson, and Co. as indorsees of three bills of exchange, accepted by them : two, dated the 23d of May, 1807, each for 500*l.* payable at sixty and sixty-five days after date ; the third, dated the 19th of June, 1807, for 346*l.*, payable two months after date : all endorsed by Rimmer, for whom they were discounted by Bruce and Warren. A debt of 1346*l.* was proved under the Commission by Bruce and Warren, who were not separate creditors of the bankrupt ; stating the consideration to be money to a much larger amount, lent and advanced by them to Rimmer ;  
[\* 248] and in their \* deposition excepting those three bills, and other bills, also endorsed to them by Rimmer, and various

(1) 1 Rose's Cases in Bankruptcy, 10.

sums, received on account of the debt, due to them from Rimmer, on other securities, deposited with them; admitting, that their debt was thus reduced to 420*l.* 12*s.* 2*d.*; and that for the overplus beyond that sum they held the said bills as trustees for Rimmer.

The Petition farther stated, that the dealing of Bruce and Warren with Rimmer was by their discounting bills for him; that the said several bills and other securities were deposited with them to a much greater amount than the money, advanced by them; and suggesting, that an investigation of their accounts would show, that there was not at the suing forth of the Commission 420*l.* 12*s.* 2*d.* due to them from Rimmer; that the whole money due from him, or from Villegille, Corson, and Co. at the date of the Commission, and proved by Bruce and Warren, has been long since paid by other securities; and that there is no sum due to them from Rimmer, or from Villegille, Corson, and Co., nor from Corson to Rimmer on his separate account; that Bruce and Warren, though entitled to prove their joint debt of 420*l.* 12*s.* 2*d.* as petitioning creditors, and to receive dividends upon that proof with the separate creditors, had no such right, as to the residue of the sum proved, as trustees for Rimmer; and, after satisfaction of the sum, so remaining due to them, were not entitled to retain their proof, except for the purpose of assenting to, or dissenting from, the certificate.

The prayer of the Petition was, that the proof may be reduced to the sum of 420*l.* 12*s.* 2*d.* and expunged, as to the overplus; that it may be declared, that such proof shall stand for the purpose of assenting to or dissenting from, the certificate, and not for the \* purpose of receiving dividends, with the separate [\* 249] creditors; and if they ought to receive dividends upon the sum of 420*l.* 12*s.* 2*d.* that an inquiry may be directed, what was due to Bruce and Warren, upon the bills at the date of the Commission.

Sir *Samuel Romilly* and Mr. *Bell*, in support of the Petition.—This proof ought clearly to be reduced; as to the surplus beyond the actual debt of Bruce and Warren, falling within the general rule, established in *Ex parte Elton* (1), after great fluctuation, that a joint creditor cannot under a separate Commission take dividends with the separate creditors: unless he is, as he may be (2), the petitioning creditor, taking out the Commission, under which his joint debt must be satisfied; but only to the extent of his actual beneficial interest: which alone, not the legal interest, is regarded in bankruptcy. If this attempt to throw upon the separate estate the whole amount of bills, indorsed merely as securities for the actual debt, succeeds, that rule will have very little effect.

Mr. *Johnson*, in support of the proof, contended, that an action

(1) *Ante*, vol. iii. 238. See *Ex parte Tait*, xvi. 193, and the references in the notes, 194; iii. 243.

(2) *Ex parte Ackerman*, *ante*, vol. xiv. 604.

might have been maintained upon the bills for the whole amount ; and the right to prove, depends upon the legal debt from the acceptor to the holder ; without regard to the state of the account between the latter and the person, from whom he received the bills.

[\* 250] \* The Lord CHANCELLOR [ELDON].—The principal point upon this Petition arises from circumstances, which I do not recollect to have before occurred. It has been long settled, that a joint creditor may take out a separate Commission ; and take dividends with the separate creditors (1) ; but that he is the only joint creditor, who can come in with the separate creditors against the separate estate. The observation, that this is very singular, has frequently been made : but the rule is so settled. The holders of these bills contend, that a debt of 420*l.* 12*s.* 2*d.* is due to them from Rimmer ; that they hold as securities for that sum these bills ; which, if not transferred to them, would have enabled Rimmer, the former holder, though a joint creditor, to take out a separate Commission ; to prove the full amount, and to receive dividends. The assignee under the Commission, not disputing that, insists, that these persons hold the bills as creditors, not for the full amount, but for the purpose of working out what may be due to them ; and that, being paid as separate creditors, the sum of 420*l.* 12*s.* 2*d.* they receive all, that is due to them. They admit that ; and no question of importance to them follows : but they say, they are the legal holders of these bills : and have proved in respect of them against the estate ; the bills, therefore, will be discharged under the Commission : and the person, from whom they were received, considers those, to whom he transferred them, as trustees of all the dividends, which, as legal creditors, they can take out of the separate estate, for him. This, it may be observed, introduces two joint creditors to take dividends with the separate creditors ; as Rimmer, if he had not handed over the bills, would not have had that right. I am much struck with

[\* 251] that consequence : but, considering the principles, \* admitted in the case of *Crispe* (2), which settled this point, and upon the judgment of the Court of Common Pleas, in Lord Chief Justice Willes's Reports, it appears to me, that the legal right alone must decide this question ; and though considerable inconvenience may be foreseen, as the result of that sort of decision, yet, the Commission being in the nature of an execution for the legal debt of the petitioning creditor, all the consequences must follow : he is entitled to take the dividends, due upon his legal proof ; and with the question, whether afterwards he is, or is not, a trustee, the other creditors have no right to interfere. The consequence is, that, if the account is not impeached, this Petition must be dismissed, but without costs.

(1) *Ex parte Ackerman*, ante, vol. xiv. 604.

(2) *Ex parte Crispe*, 1 Atk. 134; *Crispe v. Perritt*, 1 Cooke's Bank. Law, 17; 8th edit. 26; Willes, 467.

An Order was made, directing an inquiry, what was due to Bruce and Warren upon the Bills at the date of the Commission.

1. This case is also reported in *I Rose*. 10.
2. See, *ante*, note 5 to *Dutton v. Morrison*, 17 V. 193, as to the several points raised in the principal case.

HOUGHTON, }  
GRIBBLE, } *Ex parte.*

[1810, MARCH 20; AUGUST 17.]

The Registry of a Ship is conclusive evidence of the property, even between creditors; excluding all trusts, created by acts of the parties; as, by payment of money on a purchase in the name of another (a).

Distinction as to trusts, arising by operation of Law, upon bankruptcy or death. Equitable interest insurable; both trustee and *cestui que trust* have an insurable Interest (b), [p. 253.]

A JOINT Commission of Bankruptcy issued against Henry Cooke and John Herbert. At the time of the bankruptcy each of them appeared to be entitled to five sixteenth shares of the ship Devonshire; which were duly registered in their respective names. The subject of these Petitions was the title to the shares of Herbert; the first Petition praying, that the produce of those shares, and the proportion of the proceeds of the voyage, may be declared to be part of the separate estate of Herbert: and may be divided accordingly: the other Petition praying a distribution of the same produce among the separate creditors of Cooke; insisting, that the purchase was originally made by Cooke; and the five shares were afterwards transferred by bill of sale to Herbert for a nominal consideration.

Mr. Trower, for the separate creditors of Cooke, referred to the case *Ex parte Yallop* (1), as deciding this question, that upon the policy of the Registry Acts (2) the registry is the evidence of the property; and must be taken to be the evidence of it, even among the creditors.

Mr. Richards, Mr. Wetherell, and Mr. Roots, for the separate creditors of Cooke, contended, that Cooke, the original purchaser, having been prevailed upon by Herbert to execute a bill of sale to him of these shares, for a nominal consideration of 12,000*l.*, no part

(a) See, *ante*, note (a) *Ex parte Yallop*, 15 V. 60; *Weston v. Penniman*, 1 Mason, 306; notes (a) and (c) *Curtis v. Perry*, 6 V. 739.

(b) See, *ante*, note (b) *Ex parte Yallop*, 15 V. 60.

(1) *Ante*, vol. xv. 60; see page 71; *Ex parte Burn*, 1 Jac. & Walk. 378; *Kirkley v. Hodgson*, 1 Barn. & Cress. 588; that the Registry did not prevent the effect of the Stat. 21 James I. c. 19, s. 11, repealed, and re-enacted with alterations, by Stat. 6 Geo. IV. c. 16, s. 1, 72.

(2) Stat. 26 Geo. III. c. 60; Stat. 34 Geo. III. c. 68.

of which sum was paid, the interest in the ship still continued the separate property of Cooke.

Sir *Samuel Romilly* and Mr. *Cooke*, for the joint creditors, represented, that the ship was purchased in the joint account; though in the name of Cooke alone: but, upon Herbert's remonstrating, five shares were \* transferred to his account. They admitted however that this could not be distinguished from the case cited.

The Lord CHANCELLOR [ELDON].—This is an extremely important question; as it affects many decisions, that have been actually made. There is no doubt, that previously to the Registry Act, if Cooke had purchased this ship in the names of himself and Herbert, Cooke paying the whole money, and no partnership existing between them, he, who paid the money, would have been held the equitable owner. The Court of King's Bench, however, have held (1), that, if a partnership purchase a ship in the name of one, whose name alone is in the registry, in an action upon a Policy of Insurance, with an averment of interest in all the partners, which, independent of the Act of Parliament, would have been a good averment, (an equitable interest being insurable; both the trustee and the *cestui que trust* being held to have an insurable interest) (2), the production of the registry in the name of one alone was decisive proof, that the others were not interested; in effect, that what appears upon the registry is decisive evidence of the title, both legal and equitable. That decision appeared to me to strike directly at the root of all trusts, arising, not by act of the parties merely, but also by operation of Law; and I thought it very difficult to reconcile that with other determinations, upon the case of assignees under a Commission of Bankruptcy (3), executors, administrators, or next of kin, having an interest under the title of administrators; that it was difficult to maintain, that there could not be an equitable interest in a ship. Consistently with that decision I do not see, how it can be rep-

[\* 254] resented, \* that the property in this ship stood otherwise than in one of these partners as to five sixteenths, and the same proportion in the other. The case of *Curtis v. Perry* (4) went upon another ground: the peculiar object of Mr. Chiswell to conceal his interest.

1810. Aug. 17th. The Lord CHANCELLOR [ELDON].—The ground of the petition by the separate creditors of Cooke is, that the assignment to Herbert was made for a nominal consideration: but it was made in fact; and the ship was registered accordingly; and, whatever doubts have been stated, as to trusts by operation of law, there is no doubt upon a trust which is not to arise by mere opera-

(1) *Camden v. Anderson*, 5 Term Rep. 709.

(2) Arrears of annuity, or any other debt, insurable, *ante*, vol. vii. 302.

(3) *Ex parte Burn*, 1 Jac. & Walk. 378; *Kirkley v. Hodgson*, 1 Barn. & Cress. 588.

(4) *Ante*, vol. vi. 739; see the note, 745.

tion of Law, but is connected with the acts of the parties. A stronger case cannot be put, than that upon the Policy of Insurance (1); where, the interest in the ship lost being averred to be in four persons, but two names only appearing in the register, it was held, that the averment was not made good; and the Act of Parliament had excluded the equitable interest. If therefore Cooke, having the entire interest in himself, registered in his name, by his own act made Herbert the owner of this proportion of the ship, permitting the registry to be made in Herbert's name, it is impossible to maintain, that Herbert's estate is accountable to the estate of Cooke for the produce of that property.

As however the facts are not ascertained, and there is much contradiction in these petitions, supported by affidavits equally positive, I will give an inquiry, if those, who represent Cooke, desire it, as to the time, when the Bill of sale was made to Herbert, and whose money was advanced; but, let the result be what it may, I do not conceive, that the title of Herbert could be dislodged by the nature of those advances.

1. A NOTE of the judgment delivered in the matter of these petitions may be found in 1 Rose, 177.

2. As to the question what interests are, and what are not insurable, see, *ante*, the note to *Nicoll v. Goodall*, 10 V. 155.

3. With respect to the conclusive evidence of property which, in general cases, at least, the registry of a ship affords, and the modifications which that doctrine may receive from particular circumstances, see notes 1, 2, 3, 4, to *Curtis v. Perry*, 6 V. 739; and notes 1, 3, 4, to *Mestaer v. Gillespie*, 11 V. 621.

## WRIGHT v. ATKYNS.

[\* 255]

[ROLLS.—1809, Nov. 13; 1810, August 17.]

DEVISE and bequest of real and leasehold estates to the devisor's widow, and her heirs for ever, "in the fullest confidence that after her decease she will devise the property to my family," held an estate for life only, with remainder in trust for the devisor's heir, as *persona designata* (a).

WRIGHT EDWARD ATKYNS by his Will, dated the 29th of October, 1804, devised and bequeathed all his manors, &c. as well lease-

(1) *Camden v. Anderson*, 5 Term Rep. 709.

(a) The acceptation of the term "family" may be narrowed or enlarged by the context of the will, so as, in some instances, to mean children, or in others, heirs, or it may even include relations by marriage. See 2 Williams, Exec. 818, 819; *Blackwell v. Bull*, 1 Keen, 176; *Woods v. Woods*, 1 Mylne & Craig, 401; *Grant v. Lyman*, 4 Russ. 292; *Doe v. Flemming*, 2 Cr. Mees. & Ros. 638; Sugden, on Powers, (4th Lond. ed.) 525; 2 Story, Eq. Jur. § 1065 b, § 1071.

As to trusts created by words of desire, request, recommendation, in a will, see 2 Story, Eq. Jur. § 1068, 1068 a, 1069, 1070, 1071; note (b) *Bull v. Vardy*, 1 V. 270; *Peterson v. Garnet*, 2 Bro. C. C. (Am. ed. 1844), 47, note (a); S. C. ib. 226, 231, note (c), and cases cited.

hold, as freehold and copyhold, or of whatsoever tenure, in Kettering, and other places mentioned, in the county of Norfolk, and all other his real estate, unto his mother Charlotte Atkyns, and her heirs for ever, in the fullest confidence, that after her decease she would devise the property to his family; and he thereby subjected and charged the aforesaid hereditaments and premises with the payment of all his just debts that he should owe at the time of his decease; and he gave and bequeathed to his aforesaid mother all his goods, chattels and personal estate for her own benefit, after payment of his debts, funeral expenses, &c.; and appointed his mother sole executrix.

The testator died without issue; leaving the Plaintiff, his uncle, heir at law; and entitled to two sums of 2700*l.* and 1000*l.*, as personal representative of a mortgagee; being also the trustee under a conveyance by the testator's father, subject to those mortgages upon trust for payment of debts by sale; and the Bill was filed against Charlotte Atkyns, the devisee and executrix; praying an account of what was due for principal and interest upon the mortgages; and that the Defendant may be decreed to pay the same; in case the Court should be of opinion, that she is entitled to the fee-simple and inheritance of the estates devised: or in default of payment, or, in case the Court should be of opinion, that the Defendant is entitled to an estate for life only, and therefore, not bound to pay the Plaintiff, then that the same may be raised by sale.

[\* 256] \* Mr. Richards, Sir Samuel Romilly, and Mr. Heys, for the Plaintiff.—A trust may be raised according to the authorities in the Civil Law, and has frequently been raised in the Courts of Equity of this country, upon words much less mandatory than those of this Will. To support the Plaintiff's claim to the estate, and confine the Defendant to an estate for life, two incidents must be combined: the subject and the object must be certain. The property, which is the subject of this devise, is certain; viz. all the real estate of the devisor: but the objection of uncertainty will be applied to the object of his disposition, not more precisely pointed out than by the general description, "my family." That is a sufficient description for this purpose within *Pierson v. Garnet* (1), and the other authorities; attending to the nature of the subject of disposition, real estate, this description must be understood the head of the family; the heir, representing the family; as the term "relations" has been construed those, who would have taken the personal property. The devisor must have contemplated some part of his family, distinct from his mother's line. This construction is supported by the opinion, expressed in *Chapman's Case* (2);

[\* 257] \* interpreting the word "house" by "family;" which

(1) 2 Bro. C. C. 38, 226; Finch's Pre. Ch. 210. See *Brown v. Higgs, ante*, vol. iv. 708; v. 495; viii. 561, and the references in the note, i. 272.

(2) Dy. 433. The devise is in the following terms:

"I will the house that J. V. dwelleth in to my three brothers among them and J. V. to dwell still in it; and they to raise no ferme; and I will the house, that

opinion is referred to in the case of *Counden v. Clerke* (1), and in *Crossly v. Clare* (2). The only authority against that is *Harland v. Trigg* (3); upon words certainly much resembling these; but with peculiar circumstances; and the authorities, applicable to this point, do not appear to have been cited. The subject was leasehold estate; and it was very difficult to say, who was intended. He could not, as to the leaseholds for years, have contemplated the distribution among the next kin: those persons, who in case of an intestacy were the *family*, with reference to that description of property: the words, importing a long course of limitation, as of real estate, as far as the rules of law would admit: the limitation expressed as to the leaseholds for lives. The word "family" is not less familiar, in the English Law, as *nomen collectionum*, than "stock," or "relations;" meaning those, who are descended from the common ancestor. If however these words are too uncertain to support the limitation over as a devise, the Plaintiff's title, as heir at law, must prevail by way of resulting trust.

\* Mr. *Leach*, Mr. *Hall*, and Mr. *Bell*, for the Defendant.—Though the title of the Plaintiff, as heir, must be contingent during the Defendant's life, he has a right to a decision of this question, as much as if it was vested. The Law upon this subject was settled by Lord Thurlow in *Harland v. Trigg* (4); having previously been open to much contradiction; of which the case of *Cunlife v. Cunlife* (5) is an instance. There is no doubt, that these words are sufficient to create a trust: but for that purpose certainty, both as to the property and the object, is necessary. If the party, first entitled, has the power of spending any part of the property, as in *Wynne v. Hawkins* (6), the subject of disposition is not certain. In this instance that is certain: but there is no certainty as to the object; which must be defined, so that some person may apply to have the property secured: otherwise the Court will not act. That is the clear result of the authorities, as established in *Harland v. Trigg* upon sound principle. It cannot be represented, that the word

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Thomas Chapman, my brother, dwelleth in, to him, and he to pay to Christopher Chapman, 3l. 6s. 8d. to send him to school with, and else to remain to the house: provided always, that the houses be not sold, but go unto the next of the name and blood, that are males (if it may be).

If the construction of those obscure words "and else to remain to the house, scilicet, 'family;'" which shall be intended to the chief and most worthy and eldest person of the family," &c. stood upon less authority, they might, perhaps, admit another interpretation; and the conjecture does not appear unreasonable, that they had reference, not to the house devised, but to the charge of 3l. 6s. 8d., the last antecedent; meaning no more than that, if not required for the schooling of Christopher, it should sink for the benefit of the devisee. Lord Eldon, *post*, vol. xix. 300, thinks the words would very well admit this construction: but declines so to construe them for the reason here suggested. See 1 Turner's Rep. 158.

(1) Hob. 29; see 33.

(2) Amb. 397.

(3) 1 Bro. C. C. 142.

(4) 1 Bro. C. C. 142.

(5) Amb. 686.

(6) 1 Bro. C. C. 179.

"*family*" has acquired a certain, technical, sense ; binding the Court to consider the heir at law as pointed out. That was not decided in *Chapman's Case* ; which affords no authority upon this question, except an extrajudicial opinion.

Admitting, that the Defendant has a discretion to distribute among the members of the testator's family, the construction, confined to the heir at law, excluding all discretion, cannot be supported ; and the supposition, that he meant to leave her no discretion, would be most extraordinary : the expression clearly im-

[\* 259] porting, that she should \* give to such members of his family as she pleased : no one answering the description, except as the object of her choice. Admitting the case of *Cruwys v. Colman* (1) to be soundly determined, as a bequest to the next of kin, Bridget Cruwys by making no disposition leaving it to be understood, that all had behaved well to her, here the object must be selected ; and there is no person entitled by such selection to call for an execution of the trust. The term "*family*," extending through the lines of both parents, is too general and uncertain to present a definite object ; which might have been described by "children;" or any other class, less numerous, and more easily ascertained ; according to the correct view, taken of this subject by the Lord Chancellor in *Morice v. The Bishop of Durham* (2). There is scarcely a more vague denomination than "*family*." What rule is to determine among the various interpretations ; and, if it could be confined to the heir at law, between the heirs *Ex parte paterna & materna*? In *Mac Leroth v. Bacon* (3) Lord Alvanley upon the whole Will thought the husband included in the description of the "*family*" of his wife ; which is not the natural construction, according to *Barnes v. Patch* (4). The conclusion is, that this term having no distinct and accurate sense, the interpretation must depend upon the tenor of the whole instrument.

Mr. Richards, in reply.—The construction, given to the word "*family*" so long ago as *Chapman's Case* (5), followed by *Counden v. Clerke* (6), and *Crossly v. Clare* (7), considering it [\* 260] \* when applied to real estate, as denoting the heir at law, has never been impeached ; and corresponds with the natural meaning. A devise to a man's family, that is, to go in his family, can only be effectuated by a devolution in the course of law to the eldest son ; if not interrupted by particular limitation.

1810. Aug. 17th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—In this case I am called upon to determine incidentally,

(1) *Ante*, vol. ix. 319.

(2) *Ante*, vol. x. 522 ; see 535, 6.

(3) *Ante*, vol. v. 159.

(4) *Ante*, vol. viii. 604.

(5) Dy. 333.

(6) Hob. 29 ; see 33.

(7) Amb. 397.

what interest the Defendant Mrs. Atkins took under the Will of her son. The direct object of this suit is only to have a charge raised out of the estate. I have decided, that the Plaintiff is entitled to have it raised ; but, as it is to be raised by sale or mortgage, it is said, that it is necessary to ascertain, whether, if to be raised by mortgage, Mrs. Atkins is only to keep down the interest ; or is to be considered as the owner of the fee. This question certainly appears upon the face of the pleadings ; though it is not distinctly brought forward as one, which it was the purpose of this suit to have determined. The Will of the son is set forth in the Bill. The Plaintiff charges that the Defendant sometimes alleges, that she is entitled to an estate for life only under it ; and is therefore not bound to pay the sums in question, or any part thereof ; that at other times she claims to be owner of the fee ; pretending, that for some reason, which she refuses to discover, the Plaintiff has no right to raise these sums by sale of any part of the estate ; and the Bill prays, that the Defendant may be decreed to pay the money ; if the Court shall be of opinion, that she is entitled in fee ; or, if to an estate for life only, that it may be raised by sale. By her answer she denies, that she ever pretended to be entitled only to an estate for life ; but admits, that she does claim to be entitled under the Will of her son to an estate in fee. In this way it seems to me that the question \* is sufficiently raised to enable the Court to give an opinion upon it for any purpose, for which incidentally it may be necessary.

The question depends upon the meaning of the word "family." It is admitted, that the words "in the fullest confidence, that she will devise the property," are sufficient to raise a trust ; if there be no uncertainty in the object. The Counsel for the Plaintiff contend, that there is none : the word "family" in a devise meaning the same as "heir-at-law ;" and for this construction they referred to *Chapman's Case* (1) in Dyer ; where the words "to remain to the house" were said to signify to remain to "the family ;" which shall be understood as the head and most worthy and eldest person of the family. This indeed was not the immediate point in that case : but the words were referred to as showing the intention to preserve the property in the testator's house and family ; and so furnishing an argument upon the effect of the limitation to the next of the name and blood, being males.

This construction derives great authority from Lord Hobart's recognition of it in the case of *Counden v. Clerke* : where, referring to *Chapman's Case*, he says (2), "If land be devised to a stock, or family, or house, it shall be understood of the heir, principal of the house, much more, when the proper word 'heir' is expressed." According to these authorities there is no uncertainty here in the object.

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(1) Dy. 333.

(2) Hob. 33.

It is a trust for the testator's heir. I see no reason to dissent from them; if they have not been over-ruled by subsequent decisions.

Cases, relative to personal property, or to real and personal, [\* 262] comprised in the same devise, or, where the \* meaning is rendered ambiguous by other expressions or dispositions, will not bear upon this question. In the case of *Harland v. Trigg* (1) Lord Thurlow doubted, whether the word "family" had a definite meaning. The authorities, before alluded to, were not cited. The case related to leasehold estate; and it was by other dispositions in the Will rendered uncertain, in what way the testator intended the family to take the benefit of the leasehold estates: it being contended, that he meant to give them to the same uses, to which the real estate was settled. That case is therefore no authority upon this question.

In the case of *Pyot v. Pyot* (2) real and personal estate was disposed of in trust for the testatrix's nearest relation of the name of the Pyots. Lord Hardwicke says, "I think the Pyots describe a particular stock; and the name stands for the stock: but yet it does not go to the heir-at-law; as in the case in Dyer; because it must be *nearest relation*; taking it out of the stock; from which case it also differs; as the personal is involved with the real; and it was meant, that both should go in the same manner; and shall the personal go to the heir-at-law?"

No disapprobation of the doctrine of *Chapman's Case* is expressed: Lord Hardwicke only doubting, whether it was applicable to a mixed devise of real and personal estate.

In a late case in the Court of Common Pleas, Doe, on the demise of *Thwaites v. Over* (3), relative to a devise of lands to the testator's relations, Serjeant Heywood refers to a case in this Court in the following terms:

[\* 263]      \* (4) "3d July, 1732, by the Master of the Rolls. Under a limitation to the family of J. S. the real estates descend to the heir-at-law: the personal estate goes to the next of kin. MSS. note probably of the late Mr. Cox: but the Decree of that day upon search has not been found."

Supposing the Master of the Rolls to have held the Will void for uncertainty, the decision would not affect this case; as the real and personal estates seem to have been blended in one devise; and with regard to personality it cannot be contended, that the word "Family" means the heir-at-law.

Not finding any case in contradiction to the proposition in Dyer and Hobart, I think, there is in this case sufficient certainty in the object of the trust: therefore the Defendant Mrs. Atkyns must

(1) 1 Bro. C. C. 142.

(2) 1 Ves. 335. See *Leigh v. Leigh*, ante, vol. xv. 92.

(3) 1 Taunt. 263.

(4) 1 Taunt. 266.

be considered as only tenant for life of the estate, which is subject to the charge; and the Decree must be altered accordingly (1).

[THIS note also relates to *S. C.*, 19 V. 299].

1. The principal case has undergone a long course of litigation, and some of the questions which it involves have not yet [1827] been decided; nor, as it has been declared by the court of the last resort, are they capable of receiving any final determination, until after the decease of the defendant, the first devisee; when it may depend upon the exercise, or the non-exercise, of her power, who will be entitled to the produce of the timber growing on the estate which is the subject of this suit. After the decree originally made by Sir William Grant, an application was made for an injunction, to restrain the devisee from cutting timber, pending an appeal; the injunction was granted by Lord Eldon, and the report of that stage of the proceedings may be found in 1 Ves. and Beat. 313-316. His lordship, when he had heard the suit on appeal, confirmed the decree made by the Master of the Rolls: the judgment delivered on this occasion is reported more fully in Coop. 111-125, than in 19 Ves. The next step was an appeal by the defendant to the House of Lords, which stage of the suit is not yet reported; but their lordships were pleased to reverse the original decree, and the decree of affirmance, so far as these decrees declared that the defendant was only tenant for life of the estate therein mentioned; and they also reversed the order for the injunction, so far as the same was founded on the aforesaid declaration, with liberty to the defendant to apply to the Court of Chancery touching such injunction as awarded on any other ground. Immediately after the reversal by the House of Lords of the decree made in Chancery, the injunction previously obtained in the suit was dissolved by the Lord Chancellor, upon motion on behalf of the defendant, supported by an affidavit, that the incumbrances of the plaintiff had been fully satisfied. Another bill was then filed, stating that the original plaintiff was deceased, and that under the ultimate limitation of his will, and also as being the person answering the description of heir at law of the original testator, the new plaintiff was become entitled to the first estate of inheritance in the estates devised by the said original testator, whenever the defendant should depart this life. On this ground a fresh injunction was applied for, to restrain the defendant from cutting down timber, or committing any other waste upon the premises; and an account was also prayed of all timber already actually cut down, and that defendant might be decreed to make good the value thereof. The Lord Chancellor refused the injunction, holding that the defendant must be considered as having a fee, though a qualified one; his lordship did not deem her entitled to exercise the same unlimited right of ownership which an absolute tenant in fee might exercise over the timber; but still thought, that she ought not to be prevented from cutting down timber in a husband-like manner; the court taking care to preserve the property or its produce, in such a state that, when it shall be ultimately made out who is entitled, they may have the benefit of it. The minutes of the order made to effect these purposes are given in Turn. 164.

2. That, as a general rule, the tenant for life of an incumbered estate is bound to keep down the interest of those incumbrances, see note 2 to *Lord Penrhyn v. Hughes*, 5 Ves. 99; though a tenant in tail is not bound to do so in favor of the issue in tail, or of the remainder-man: and, if the tenant in tail, in possession and receipt of the rents and profits of a mortgaged estate, lets the interest due on the mortgage run in arrear, neither the issue in tail nor the remainder-man can come against the tenant in tail in possession to compel him to keep down the interest, nor against the personal representative of the tenant in tail, during whose possession the arrears have accrued, to compel him to discharge those arrears: *Chaplin v. Chaplin*, 3 P. Wms. 235; *Amesbury v. Brown*, 1 Ves. Sen. 480. That the principle upon which the last-stated doctrine is founded is the absolute power which, under ordinary circumstances, a tenant in tail, of full age, might acquire over the whole estate; but that the estate of a tenant in tail (and, as the principal case shows, even of a tenant in fee) may be so qualified as to make the general

(1) Affirmed by Lord Eldon, post, vol. xix. 299, Coop. 111.

rule and its consequences inapplicable, see, *ante*, notes 1, 2, to *The Countess of Shrewsbury v. The Earl of Shrewsbury*, 1 V. 227.

3. That words of recommendation, of trust, or of confidence, in a will, have generally the force of an imperative direction, see note 2 to *Bull v. Vardy*, 1 V. 270, and note 4 to *Moggridge v. Thackwell*, 1 V. 464; and for certain qualifications of that doctrine, see note 2 to *Pigott v. Bullock*, 1 V. 479.

4. As to the different constructions which it may be proper to put upon the word "family" in a will, when the subject of bequest is personality, from that which has been held to be the right legal import of the word when it is found in a devise of real estate, see note 5, 6, to *Brown v. Higgs*, 4 V. 708.

5. The *Anonymous case*, cited by the Master of the Rolls in the principal case, is noticed in *Doe v. Smith*, 5 Mau. & Sel. 132.

6. That, as a general rule, a plaintiff is not entitled to move for an injunction under the prayer for general relief, see the note to *Jacob v. Hall*, 12 V. 458.

7. The same words, in a will, may have a different operation, with reference to different sorts of property governed by different rules: see note 1 to *Fordyce v. Ford*, 2 V. 536.

[\* 264]

## CAMPION v. COTTON.

[ROLLS.—1810, JULY 16, 17; AUGUST 17.]

SETTLEMENT sustained by the consideration of marriage against creditors; notwithstanding false recitals, that the property was the wife's; [protecting also voluntary expenditure by the husband after the marriage in improvement by building and enfranchising copyholds; but not jewels and furniture, purchased by him after the marriage, and given to her (a).]

The consideration of marriage will support a settlement even of movable effects; and neither the joint possession of furniture, nor the want of an Inventory, nor the fact, that the settlor was indebted at the time, and that his wife knew it, will affect the settlement, [p. 271.]

THE Bill, filed by a creditor, on behalf of himself and all the other simple contract creditors of J. L. \* deceased, against his executor, and heir, and Charlotte L. his widow, stated, that J. L. a stock-broker, in 1775 went to board and lodge with Charlotte L.; and married her in June, 1805; having no property of his own; but having laid out considerable property of other persons, received by him in the course of his business; and with the view of making a provision for himself and Charlotte L. and of withdrawing out of the reach of his creditors a considerable part of his property, he at different times transferred into the name of Charlotte L. alone, or jointly with others, various sums of stock,

(a) Marriage is deemed a valuable consideration, as much as money, goods or services, and fixes the interest in the grantee. 4 Kent, Com. (5th ed.) 463, 464; *Sterry v. Arden*, 1 Johns. Ch. 261; S. C. 12 Johns. 536; *Huston v. Cantril*, 11 Leigh, 136; *Tunno v. Trezevant*, 2 Desaus. 264; *Whelan v. Whelan*, 3 Cowen, 538, 579; *Maguire v. Thompson*, 7 Peters, 348; S. C. Baldwin, 358.

A parol agreement before marriage to settle the personal estate of the wife to the use of the marriage, is not sufficient to support a settlement executed after marriage, and after the marital rights had attached against the creditors of the husband. *Izard v. Izard*, 1 Bailey, Eq. 228. See also *Koonee v. Bryan*, 1 Dev. & Bat. Eq. 227; *Reade v. Livingston*, 3 Johns. Ch. 488; *ante*, note (a) *Brown v. Carter*, 5 V. 877.

and invested money in stock and other securities, in her name alone, or with others ; that he also with the same view delivered to her various jewels, &c. purchased with the money of other persons, at the time he was such trader and indebted, as before mentioned. By his Will, dated the 10th of November, 1799, he made the following disposition :

" I request the small debts I owe may be discharged as soon as conveniently may be. I give and bequeath to Mrs. Charlotte L. with whom I now board and lodge at Golder's Green, the sum of 500*l.* lawful money," to be paid her within six months after his decease ; " which I should consider a very poor compensation for the great obligations due to her, did I not take into consideration, that the whole of the furniture, wine, plate, stock, carriages, &c. (with some trifling exceptions) are her own property, with a trifle in the funds, which she has saved in twenty-five years' unremitting attention to my ease and comfort." He gave all the rest of his property to his nephew Cotton ; and appointed him executor.

The testator died in 1808 ; seised of considerable real estates ; and indebted by specialty and simple contract \* to [\* 265] a considerable amount. Charlotte L. entered into possession of some copyhold estates ; to which she claimed title ; and also of some freehold estate ; which she claimed as a gift to her by the testator in his life.

The Bill charged, that the assignment of the funds, &c., was fraudulent ; that they were not purchased with her own money ; that the testator was at the time, and with her knowledge, greatly indebted beyond what he possessed ; that the transfers were made, and the jewels delivered, for the purpose of defeating the creditors ; that the money, plate, furniture, &c., were not her own property, or settled to her separate use, but his property ; that a surrender of copyhold estate on the 22d of January, 1803, purchased by the testator, as she pretends, and as it was declared, with 600*l.* her money, to him and his heirs in trust for her, with a covenant that he would stand seised in trust for her, and an admission accordingly, and two other purchases in 1805, for 610*l.* and 575*l.* under similar circumstances, were fraudulent ; being made with his money, with the view to enfranchise the copyholds, and make them freehold ; and that by a deed, dated the 19th of September, 1806, the testator fraudulently declared, that 500*l.* paid for enfranchising copyholds, was her property ; whereas it was his own : that she alleges, that previously to the marriage a settlement was executed, dated the 1st of June, 1805, reciting, that she was possessed of 2500*l.* 3 per cent. Consolidated Bank Annuities, 2500*l.* 3 per cent. Reduced Annuities, standing in her name, and of 1200*l.* 3 per cents. in the names of himself and Charlotte L. I. deceased, also of goods, household furniture, jewels, &c. ; that the testator was seised to him and his heirs of freehold and copyhold estates, purchased with her money ; and declaring, that in consideration of the marriage, &c., those funds, the rents, and jewels, should be held for her sole and sepa-

rate use: that she might assign, transfer, sell, &c.; with power to limit or dispose by Will.

The Bill, charging, that all these recitals were fabricated and false, prayed an account of the debts, and the personal estate, &c.; that the several deeds and instruments executed by the testator in favor of Charlotte L. may be declared fraudulent and void: that the real estate may be declared liable to the specialty debts; and that the funds of stock may be declared liable, and be applied, in discharge of the debts.

The Defendant, the widow, by her answer denied all the charges of fraud; claiming the furniture, and other specific articles, as purchased with her own money, and as presents, made to her by the testator; stating, that the estates were purchased partly with her money, partly with his; that the stock was purchased with her money, at her desire; that she delivered to the executor such jewels and personal property as belonged to the testator: and those, retained by her, were purchased by him for her, with her money, arising from savings, presents, and otherwise; and the only jewels and plate given to her, were some trifling articles, specified, given to her the day before his marriage. She denied the knowledge, that he was indebted; believing him to be of considerable property, &c.; and insisted, that the settlement, being in consideration of marriage, is good against the creditors.

Sir Arthur Piggott, Mr. Hollist, Mr. Leach, and Mr. Cooke, for the Plaintiff.

[\* 267] \* Sir Samuel Romilly and Mr. Bell, for the Defendants.—First, as to the real estate: the mere conversion of property, before the late Act of Parliament (1), making the real estate of a trader assets, was never considered a fraud upon the general creditors. *Stephens v. Olive* (2), and all the cases of that class, arose upon Bills, filed by specialty creditors: whose debts were directly disappointed by the settlement; and there is no instance of a claim by simple contract creditors established upon the principle, that, specialty debts being paid, they were by marshalling entitled to stand in the place of the creditors by specialty. Another objection to this Bill is, that the estate was at the time of the conveyance copyhold: not by the then or present state of the law liable to these debts; and the subsequent enfranchisement cannot have effect by relation: so as to give the transaction the character of fraud originally. If, when the transaction took place, it was not fraudulent; it could not become so by any thing, that passed afterwards: the fraud in these cases consisting in placing the property in that state, in which it cannot be reached by the creditors. The act of enfranchisement must be considered, not as a fraud, but as an addition to, and improvement of, that estate, at that time, belonging to another person. In a late case in this Court, *Burroughs v. \_\_\_\_\_*, a

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(1) Stat. 47 Geo. III. c. 74.  
(2) 2 Bro. C. C. 90.

trader, aware, that he was insolvent, redeemed the land tax of an estate, settled on his wife. The creditors contended, that the effect of extinguishing the land tax was a fraud on them; and that the transaction ought to be considered a purchase by him; and it should be kept alive for their benefit; but it was held to be clearly merged; that it had become part of the estate; and could not possibly be followed upon any notion of fraud. This applies, not only to the enfranchisement, but also the money expended in improvements, and \* in the purchase of real estate. The [\*268] case of expenditure on an estate by a man, knowing himself to be insolvent, and meaning to save as much as he can, must have frequently occurred. How, if this notion that property, so applied, can be followed, by way of lien, prevails, is the line to be drawn: or is it to comprehend draining and every species of improvement in tillage, &c.? The attempt was never made before; and the conclusion is, that as to the real estate such a transaction cannot be considered a fraud upon creditors.

The farther consideration, applicable to the personal, as well as the real, property, is, whether under all the circumstances this can be constituted a case of fraud. There is no decision to be found, in which a settlement, previous to, and in contemplation of, marriage, has been considered as fraudulent against creditors. That a case strong enough for that purpose might exist cannot be denied; as if the wife was clearly a party; and the marriage a more secure mode of defrauding the creditors; but no such decision has been yet made. The wife must be clearly proved to have had knowledge, that a fraud upon creditors was intended. In a late case, *Ex parte Rutherford*, the bankrupt had married his servant; executing a settlement: as if he possessed considerable property; covenanting, that he would transfer stock to her for her life, with the absolute power of disposition afterwards. Upon her Petition to prove the value of the stock under the Commission it appeared, that she was told before the marriage, that he had no property to settle; and it was contended, that the transaction was a fraud upon the creditors; but the Lord Chancellor held it a good debt; which she must be permitted to prove; and it stood over merely to inquire, when the demand was made; with the view to ascertain, that the debt \* accrued before the bankruptcy (1). The Lord [\*269] Chancellor certainly did not go the length of stating, that a settlement even upon marriage might not be fraudulent: but that case is an authority, that the wife must be clearly proved a party to the fraud; which in this instance is denied: and not proved. The Plaintiff has not proved, that the Defendant knew her husband's situation: but they have shown, that he deceived all the world: those, whom it is most difficult to deceive: not merely persons dealing with him, but even his own partner. It was natural for her,

(1) *Ante, Ex parte Mare*, vol. viii. 335; *Ex parte Day*, vii. 301; and the note, 303.

knowing his situation, and observing the confidence, reposed in him by many considerable persons, giving him the management of all their stock transactions, to expect much more than the settled property ; and the relation, in which they stood, not being at that time married, affords a satisfactory reason, why that, which might be intended as bounty, should not have the appearance of a mere voluntary conveyance ; and accounts fairly for the mode without any imputation of fraud. The other hypothesis requires the Court to presume, that he, after a long cohabitation before his marriage, communicated his purpose to live with her in splendor ; acknowledging, that he was worth nothing ; and there would be nothing for his creditors. Can it be conceived, that he made that representation, when proposing to make her his wife ; and that they both proceeded in such a plan of delusion ?

Supposing therefore the fact to be established, that all these articles were his property, and admitting, that she allowed them to be represented as her's, an honest motive may be ascribed to them ; that, as she was to become his wife, and to be introduced into society

in that character, she was desirous of appearing possessed [\* 270] \* of property ; and he was willing to gratify that inclination : an unnecessary measure certainly : as there can be no doubt, that he might upon his marriage, though she brought him no fortune, have settled the whole of his property. If the object was fraud, it might easily have been contrived by opening an account in her name, and permitting her to draw. The mere recital in the settlement could not have baffled, or imposed upon, creditors ; but was a measure adapted to the view, that has been stated, of creating the appearance of property, and drawing a veil over her real circumstances. No suspicion can attach upon her not disclosing all the means, by which she had acquired property. Taking this transfer of stock to have been a gratuitous gift to her, before marriage, and admitting him to have been in a state of insolvency for twenty years, can stock, actually transferred, though without consideration, not in contemplation of bankruptcy or dying insolvent, be recalled ? Would it not be her property, if she had married any other person ; and why then may it not form the consideration upon her part for the marriage, and for any settlement upon her ? The same reasoning applies to the stock in the house, furniture, jewels, &c. which were actually her's by gift, previous to the marriage. In a Court of Justice there is no measure of the consideration of marriage by pecuniary value : *Douglas v. Ward* (1). *North v. Ansell* (2). *Wicherly v. Wicherly* (3). Doe, on the demise of *Watson v. Routledge* (4). The party giving up all other prospects, it is a consideration for pecuniary value to any amount. The express provision by

(1) 1 Ch. Ca. 91.

(2) 2 P. Will. 618.

(3) Cited 2 P. Will. 619.

(4) Cowp. 705.

the Legislature in the case of bankruptcy (1), avoiding voluntary conveyances and gifts, except upon the marriage of the bankrupt's children, proves, that in no \* other instance a [\* 271] gift, if made *bona fide*, can be recalled.

The conclusion is, that, as all these transactions are to be accounted for without imputing fraud, except by placing them in the worst light, and suspicion alone is not sufficient, the Bill, which according to *Alsager v. Rowley* (2) and other cases could not be supported as to the personal estate without suggesting collusion with the executor, must be dismissed. It would be most unsafe to send a case of this nature to the prejudices of a Jury; and there is no instance of an issue, directed upon such a question, involving a conclusion of Law from facts.

1810, Aug. 17th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—If the effect of the deed, executed upon the marriage of the Defendant Mrs. L. be such as is contended for by her Counsel, it will be unnecessary to enter into the consideration of various topics, which were discussed at the hearing. They insist, that whether the stock, the furniture, and the real estate, were purchased with her money, or not, the deed, in the nature of a marriage-settlement, gave her such a right to all these descriptions of property as cannot be impeached by her husband's creditors. It is clear, that, supposing the whole to have been his property, he might have settled it upon his marriage. According to the cases decided at Law even the movable effects might be so settled; and neither the joint \* possession which he had of the furniture, nor the want [\* 272] of an inventory, would invalidate the settlement. It is clear also, that the fact of his being indebted at the time, and of her knowing him to be so, would not affect its validity.

Then, assuming the falsehood of the declaration, that the property had been purchased with her money, will that circumstance prevent her acquiring, as against him, and those claiming under him, all the rights, which the settlement acknowledged her to have, and professed to secure to her? I apprehend it to be clear, that the husband, not only could not controvert her right to any part of the property, but was compellable to do whatever acts might be necessary to invest her with a complete title to it. He has expressly covenanted so to do; and the marriage was a sufficient consideration for the covenant. Then how is it fraudulent against the creditors? The utmost they can make of the falsehood in the deed, is, that the property was in truth Mr. L.'s; though it was asserted to be her's: but, if he could settle this property, and has done what bound him to give a title to it, supposing it to be his, how are they advanced by establishing that fact? All she could necessarily collect from seeing it asserted in the

(1) Stat. 1 Jam. I. c. 15, s. 5. Repealed and re-enacted by Stat. 6 Geo. IV. c. 16, s. 1, 83.

(2) *Ante*, vol. vi. 748; *Ullerson v. Mair*, 4 Bro. C. C. 270; *ante*, ii. 95; and the note, 96.

preceding declarations of trust, that the real estate had been purchased with her money, contrary to the fact, was, that he chose to take that mode of giving her those estates. I do not think, it can be inferred from the evidence, that she knew, he was in such circumstances as to make his bounty to her a fraud upon any one. While it was mere bounty, she could not indeed have compelled him to complete her title by conveyance: but from the moment the consideration of marriage intervened it became matter of obligation upon him to give her all the title he himself had; and there is no proof of any such fraud in her as can prevent her receiving the [\* 273] \*benefit of that obligation. There is no ground therefore, upon which the creditors can avoid the settlement in the whole or any part.

As to the additional value, that the land may have received by building, subsequent to the marriage, or by enfranchising copyholds, I do not see, how it is possible to make a mere voluntary expenditure by him upon her estate a ground of charge against her, or the estate. The jewels, purchased by him, and given to her after the marriage are subject to the debts unquestionably. The account of the testator's estate, prayed by the Bill, is quite of course. There must be an inquiry, whether any jewels or articles of furniture, purchased by him subsequent to the marriage, were in the possession of his wife, or any other person for her use, at the time of his death.

1. As to the circumstances necessary to make a settlement, by a man on his wife, valid against creditors, and also as to the effect of recitals in such instruments of settlement, see, *ante*, notes 4, 5, 6, to *Dundas v. Dutens*, 1 V. 196, and note 1 to *Ex parte Gardner*, 11 V. 40.

2. A settlement by a man previous to his marriage, and as an inducement thereto, would, if no actual fraud were shown, be sustained even against purchasers; for the wife, in such case, would also be a purchaser for herself and her children; but, when the contract of marriage has been completed, it no longer affords, in the eye of the law, any consideration for a post-nuptial settlement, whereby purchasers or previous creditors would be defeated, though against the husband himself it would be good: *Curtis v. Price*, 12 V. 103; *Smith v. Garland*, 2 Meriv. 127. And, when a post-nuptial settlement is shown to be not a mere voluntary transaction, but founded on a *bona fide* valuable consideration received for the same, as the motive for executing it, the settlement will be supported without scrutinizing very rigidly the precise adequacy of the consideration: see the notes to *Nairn v. Prouse*, 6 V. 752.

3. That a court of equity will not compel the execution of a contract merely voluntary, and which rests *in fieri*, see note 2 to *Colman v. Sarrell*, 1 V. 50.

4. A widow's *bona paraphernalia* are subject to her husband's debts, but not to his legacies; and even for the purpose of paying his debts there may be other funds previously applicable: see note 3 to *Aldrich v. Cooper*, 8 V. 382.

## TODD v. GEE.

[1810, APRIL 4, 5; AUGUST 21.]

THE rule, that the Plaintiff being entitled to discovery only, and not to the relief, a general demurrer lies, does not prevent a demurrer to the relief, giving the discovery (a).

Plaintiff in a Bill for specific performance of a contract, is not entitled, generally, to satisfaction by way of damages for the non-performance, to be ascertained by an Issue, or a reference to the Master (b). Distinction as to the case of compensation: as for a part subject to tithes, though represented as tithe-free; giving the purchaser, if he chooses to take the purchase, a right to compensation, but not to compel the Vendor to purchase the tithes (c).

Demurrer not good in part, and bad in part: therefore going to relief, to which the Plaintiff was entitled, over-ruled generally: the Plaintiff, a purchaser, not being barred by a Report against the title in another Suit, upon a Bill against him by the Vendors,

Reference of title on motion in a simple case of specific performance, where nothing more, [p. 278.]

THE Bill prayed the specific performance of an agreement for the sale of an estate to the Plaintiff by the Defendants; or, if the Defendants cannot perform \* it, that the Plaintiff may [\* 274] receive satisfaction for the damages and injury, sustained by the non-performance.

The Bill stated, that the sale was by auction on the 24th August, 1802, for 16,000*l.*: the particular describing the estate as four hundred and twelve acres; two hundred and twenty-seven of which were tithe free, paying a very small *Modus*. Under a reference, directed on motion in another cause, upon a bill, filed by the Defendants in this suit, devisees of Robert Barton, against Todd, the Master reported, that they cannot make, or by any Act procure to be made, a good title; to which Report exceptions were taken; and are still depending. The objection to the title arose from the Defendants having refused to have an account taken of the money, which they have received from such part of the testator's personal estate as by his Will was made subject to his debts and legacies, of the real estates, devised to be sold, and of his debts and legacies, and from their refusing to purchase the tithes of such part of the estate as was described in the particular to be tithe-free.

The Bill farther stated the title, derived under the Will of Robert Barton; devising estates at Bampton and other places in the county of York, to the Defendants Gee and Osborne, and the widow of the testator, upon trust to sell all or such parts as they should judge necessary and proper; and to apply the money in the first place in

(a) See, ante, note (a) *Brandon v. Sands*, 2 V. 514; note (a) *East India Co. v. Neaze*, 5 V. 173; note (a) *Sutton v. Scarborough*, 9 V. 71; *Pool v. Lloyd*, 5 Metcalf, 525; Story, Eq. Pl. § 312, and notes.

(b) See, ante, note (a) *Gorillim v. Stone*, 14 V. 128.

(c) Courts of Equity look to the substance of the contract, and do not allow small matters of variance to interfere with the manifest intention of the parties. See, ante, note (a) *Craven v. Tickell*, 1 V. 60; note (a) *Calverley v. Williams*, 1 V. 210; note (a) *Calcraft v. Roebuck*, 1 V. 221; note (a) *Bowler v. Round*, 5 V. 508.

payment of all the testator's debts ; and to place out the surplus at interest for his wife for life ; and after her decease to pay his legacies in exoneration of his personal estate ; and to continue the surplus, if any, at interest for the persons entitled to the residue of his real estate ; and he devised all other his estates, and also such of his estates in Bampton, &c. as should not be disposed of by his trustees for the purpose before mentioned, to his \* wife for life, in satisfaction of all claims, and after her decease to the Defendant Robert Christie Barton, and to his sons and daughters, in strict settlement, with remainder to the Defendant Napier Christie Barton, and his issue, in the same manner ; remainder to the third and other sons of Mary Christie Barton, the mother of those Defendants ; with remainders over : the Will declaring, that, in case the estates, thereby devised, should not be sufficient for his debts, and such legacies as are directed to be raised by sale of such estates, then and in such case only the testator devised such part of his other estates as should be sufficient for the debts and legacies to the Defendants Mary Barton, Richard Gee and Robert Osborne, their heirs and successors, upon the same trusts as before expressed respecting the estate before devised in trust to be sold ; and he appointed his wife executrix.

The Bill charged, that, if the accounts were taken, it would appear, that the estate agreed to be sold to the Plaintiff, or some part thereof, was devised to the Defendants Barton, Gee, and Osborne, in trust to be sold, to pay the debts and legacies of the testator ; and that by having the accounts taken, and purchasing from — Cooper the tithes of part of the estates, stated to be tithe-free, and which he was willing to sell, and by other necessary acts, they may make a good title to all or the greater part of the premises.

To this Bill the Defendants Gee and Osborne put in a Demurrer and Answer ; demurring to the relief for want of equity ; and admitting that a Bill had been filed against the Plaintiff, as stated ; and that Mary Barton was dead.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Heald*, in support of the Demurrer.—\* This Demurrer to the whole relief, giving the discovery, is right in form : *Hodgkin v. Longden* (1).

The merits rest upon three cases : *Denton v. Stewart* (2), *Green-*

(1) *Ante*, vol viii. 2.

(2) *DENTON v. STEWART*. July 4th. 1786. Cited from the note of Sir Samuel Romilly.

This was a Bill brought for a specific performance of an agreement, to assign a lease to the Plaintiff. The agreement was by parol : but had been in part carried into execution. After the agreement the Defendant assigned the lease to another person for valuable consideration without notice. The Bill only prayed a specific performance of the agreement. The fact of the Defendant's having afterwards assigned the lease was not stated in the answer, nor appeared in proof in the cause ; but was alleged by the Defendant's Counsel, as a reason why it was impossible for him to perform the agreement.

The MASTER of the ROLLS referred it to the Master to inquire, what damage the Plaintiff had sustained by the agreement's not having been performed : and

*away v. Adams* (1), and *Gwillim v. Stone* (2). The last is a direct authority against the notion, that a Court of Equity can give damages in these cases of failure in performing a contract. The case of *Greenaway v. Adams* turned upon the circumstance, that the Defendant, by her own act, after she had entered into the contract, rendered herself incapable of performing it. In the case of *Denton v. Stewart* justice was certainly done by the Decree: but it ought to have been forgotten the instant it was pronounced. The reason of the Defendant's submitting to it was, that it did not appear in the cause, that the lease had been assigned; and the Court would therefore have decreed a specific performance without regard to the mere allegation at the bar. If the Court is to proceed upon the honesty of the transaction, why will not the same principle sustain such a Bill upon an agreement for goods sold, work and labor, or any other object?

Mr. William Agar, for the Plaintiff.

The Lord CHANCELLOR [ELDON].—With regard to the form of this demurrer I abide by the opinion, which I find I have before expressed; that, though Lord Thurlow so far altered the rule of the Court, that, where the Bill prayed discovery and relief, the discovery being with a view to the relief, the Plaintiff not being entitled to the relief, a general Demurrer was allowed (3), yet it was competent to a Defendant to avail himself, or not, of that alteration in the course of pleading; and therefore to demur to the relief; giving the discovery, as the materials to sustain an action; though he could not be compelled to give it. That objection therefore will not hold.

As to the merits, I should be inclined to support the whole course of previous authority against \* *Denton v. Stewart*; [\* 277] not being aware, that this Court would give relief in the shape of damages; which is very different from giving compensation out of the purchase-money. The reason of submitting to the Decree in that case is apparent from Sir Samuel Romilly's note. My opinion is, that this Court ought not, except under very particular circumstances, as there may be, upon a Bill for the specific performance of a contract to direct an issue, or a reference to the Master, to ascertain the damages. That is purely at Law. It has no resemblance to compensation. Where, for instance, an estate is held with

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decreed, that the Defendant should pay to the Plaintiff such damage, so to be ascertained, together with the costs of this suit.

Mr. Mansfield, for the Defendant, desired, that the reference might be to inquire, whether the Plaintiff had sustained any and what damage; and said, that it was very probable, that no damage at all had been sustained by the Plaintiff: but the Master of the Rolls said, that if the Plaintiff was entitled only to nominal damages, if the loss he had sustained had been ever so inconsiderable, the Defendant had acted so dishonestly, that he ought to be made to pay the costs; and refused to alter his Decree.

Mr. Scott and Mr. Bolton, for Plaintiff, Mr. Mansfield, and Mr. Shuter, for Defendant. See *ante*, vol. i. 329; 1 *Fonb. Tr. Eq.* 44. *Blore v. Sutton*, 3 *Mer.* 237.

(1) *Ante*, vol. xii. 395.

(2) *Ante*, vol. xiv. 128.

(3) See the notes, *ante*, vol. ii. 461; viii. 3.

an engagement, that a certain number of acres are tithe-free, which is not the case, and the vendee contracts to sell to another person with a similar engagement, this Court would give compensation for so much as was not tithe-free; but would not give compensation for the damage, sustained by not being able to complete the subsequent contract; which might fairly be offered to the consideration of a jury. About the time, when *Denton v. Stewart* occurred, some degree of irritation was excited in the Court by persons, called land-jobbers; contracting for estates without any intention of paying for them; and setting up defects of title, merely with the view of gaining time to dispose of them; and on that ground Lord Rosslyn was prevailed upon to direct a reference of the title immediately on motion; and there is not much mischief in that upon a simple case of specific performance; where there is nothing more: but the relief may be so modified and qualified, with reference to the nature and object of the contract, that, unless it is purely that point, great difficulty may arise (1).

According to the old course two Bills were filed. The purchaser might have to acquire a specific performance, so far as the vendor

can make a title, an allowance for so much as he cannot  
[\*278] make a title to, compensation for \*freehold, turning out to  
be leasehold, &c. Unless both causes come on together, it was impossible under the vendor's Bill to provide for all these equities, to which the vendee might be entitled. In this case, if the purchaser can have all the relief in the former cause by reason of the vendor's having submitted specifically to perform the contract (which however may be very different from the relief, to which the purchaser is entitled) this Demurrer will prevail: but if the purchaser cannot have as much done for him in that suit as in this, the Demurrer is not good.

*Aug. 17th.* The Lord CHANCELLOR [ELDON].—My opinion upon the question, which depends on the three cases cited, *Denton v. Stewart*, *Greenaway v. Adams*, and *Gwillim v. Stone*, is confirmed by reflection; that, except in very special cases, it is not the course of proceeding in equity to file a Bill for specific performance of an agreement; praying in the alternative, if it cannot be performed, an issue, or an inquiry before the Master, with a view to damages. The Plaintiff must take that remedy, if he chooses it, at Law: generally, I do not say universally, he cannot have it in Equity; and this is not a case of exception. In *Denton v. Stewart* the Defendant had it in his power to perform the agreement; and put it out of his power pending the suit. The case, if it is not to be supported upon that distinction, is not according to the principles of the Court.

The next consideration is, whether what passed in the former

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(1) See, *ante*, *Moss v. Matthews*, vol. iii. 279, and the note, 281. On partial submission of Defendant in a tithe cause, reference of the account and costs directed on Motion; Defendant undertaking to pay, without prejudice to the other questions. *Lowe v. Firkins*, 11 Pri. 453.

cause is a bar to this Bill; and whether advantage can be taken of it by this form of pleading; and my opinion is, that it is not a bar. The allegation is, that two hundred and twenty-seven acres "are tithe-free; \* paying a very small *Modus*;" not [\*279] stating a positive exemption from tithes; and, where the contract is to sell an estate tithe-free, the vendor not representing himself to have title to the tithes, without entering into the question, whether the purchaser ought to be compelled to take it, if not tithe-free (1), yet, if he chooses to take it, he cannot compel the vendor to buy the tithes; if there is a positive title to them in pernancy: all he can have is compensation (2). The Plaintiff also has a right to have ascertained, whether the estates, appropriated in the first instance to the debts and legacies, were sufficient. On these two grounds therefore the Demurrer would not do: but it cannot be good in part, and bad in part: and going to relief, to which the Plaintiff is entitled, it is of no consequence, that there is some relief, to which he is not entitled. He is entitled to relief by having an account taken; to show, what is not apparent in the other cause, whether a title can be made. At least he is entitled to discovery with a view to that. Whatever may be the state of the other record, there is not enough in this record to bar that relief; and if there is enough in the former cause, there must be another way of stating that than this Demurrer; which refers to nothing more than the contents of the Bill.

The Demurrer must therefore be over-ruled.

1. WHERE a bill prays relief as incidental to a discovery, which is also prayed, a demurrer, good as to the relief, will be likewise good as to the discovery: but it is possible for a plaintiff to make the discovery a substantive part of his case: see, *ante*, note 1 to *Renson v. Ashley*, 2 V. 459.

2. With respect to the very slight authority now attaching to the case of *Denton v. Stewart* (cited in the principal case), see note 2 to *Greenaway v. Adams*, 12 V. 395.

3. Under what circumstances it may not be unreasonable to decree the substantial performance of an agreement, with compensation for slight deviations from the strict letter of the contract; and as to practice of directing a reference to the Master that he may make a report on this head; see notes 5, 6, to *Cooper v. Denne*, 1 V. 565, and notes 1, 2, 3, to *Drewe v. Hanson*, 6 V. 675.

4. That the injury sustained by either party to a contract, in consequence of its non-execution, is, except in very special cases, more properly the subject of an action for damages, than of an inquiry before the Master, with a view to a decree in equity, for compensation, see *Gwillim v. Stone*, 14 Ves. 129; *Blore v. Sutton*, 3 Meriv. 248.

5. The general rule, that a demurrer, if it be not good in its full extent, must be totally overruled, is unquestioned; but it seems it is not so universal as to admit no exceptions: see note 3 to *The Mayor and Commonalty of London v. Levy*, 8 V. 398.

6. The demurrer put in in the principal case being overruled, the question between the parties was regularly brought to a hearing, when a specific performance was decreed, and the vendor, who, during fifteen years, had retained possession of the whole estate, and of an instalment paid to him of one third of the purchase-

(1) *Ante*, vol. vi. 678; xiii. 78, 9, and the note.

(2) *Balmanno v. Lumley*, 1 Ves. & Bea. 224. See, *ante*, *Milligan v. Cooke*, vol. xvi. 1; *Calcraft v. Roebuck*, i. 221, and the note, 226.

money, was, under the circumstances, decreed to account, not only for the rents and profits of the estate, but also for interest, after the rate of 4 per cent., upon one third of the rents and profits: this concluding stage of the suit is reported in 1 Swanst. 255-264.

[\* 281]

### GREY v. THE DUKE OF NORTHUMBERLAND.

[1809, Nov. 9.]

**INJUNCTION** in the case of trespass by the Lord of a Manor digging for coal on the premises of a copyhold tenant (*a*).

From the nature of the subject and the consequences such an Injunction not to be continued without securing the means of a speedy trial.

Though the property in mines, or trees, may be in the Lord of a Manor, it does not follow, that he can enter, and take it, without consent of the tenant, [p. 282.]

UPON a Motion to dissolve the Injunction in this cause (1), restraining the Defendant, lord of the manor of Tynemouth, from digging coal upon the copyhold estate of the Plaintiff, the following observations fell from the Court.

The Lord CHANCELLOR [ELDON].—The Bill represents the Defendant as being seised in fee of the manor: but that is corrected by the answer; stating him to be tenant for life under a marriage-settlement; and therefore seised of the mines, if they were vested in the lord, for his life only. The only equity, set up by the Bill, is, that the Defendant, not having yet established his right at law, is proceeding to dig mines within the township of Backworth, which is admitted to be within the manor: the Bill insisting, that the lord of the manor has not a general right to the mines in that manor; but, farther, that, if he has that general right, he is not entitled to the mines of Backworth: which is alleged to be a distinct township; and then stating, that if the Defendant commits what the Bill contends in effect is trespass, the consequence will be irreparable mischief; and therefore the Defendant is not to be allowed to break the soil, and erect buildings, and particularly engines, on the estate of the Plaintiff; and should be restrained by Injunction, until an action can be tried.

In continuing the Injunction I was influenced by the fact, that the Court has frequently interfered in the case of trespass (2), [\* 282] by \* a local knowledge of the means of working coal mines, usually applied in that part of the country; and that the exercise of the right in the mean time would change, and

(*a*) As to injunctions to stay waste, see, *ante*, note (*a*) *Smith v. Collyer*, 8 V. 89; as in the case of opening a mine, note (*b*) and (*c*) *Hanson v. Gardiner*, 7 V. 305; 2 Story, Eq. Jur. § 929; *Livingston v. Livingston*, 6 Johns. Ch. 497-499.

(1) *Ante*, vol. xiii. 236.

(2) *Ante*, *Mitchell v. Dors*, and the note, vol. vi. 147. See vii. 307, 8; *Court-hope v. Maplesden*, x. 290; *Norway v. Roue*, post, xix. 144.

deeply affect the property ; and therefore it was proper, that a trial should take place. On the other hand the Court is bound to attend to this consideration ; that if the Duke of Northumberland is seized in fee of the manor, inconceivable mischief may ensue from upholding the Injunction too long ; as the value of the opportunity of working a coal mine, if lost, may never be recovered ; especially if it is contiguous to other mines, belonging to the same person ; and, applying those considerations to the case of a tenant for life, it is clear, that the interposition of the Court must be with a considerable pressure, that on the part of the Plaintiff there shall be no delay in going to trial. This principle was acknowledged in Lord *Byron's Case* (1) and many others.

I have looked at the report of the case in the Court of King's Bench (2) in the year 1808 ; which decides nothing as to the right, put in issue here ; but from which I collect, that the lord of a manor may be in the same situation with respect to mines as with respect to trees : that is, the property may be in him : but it does not follow, that he can enter, and take it, without consent ; which must be acquired by purchase, or otherwise. It was understood both by Lord Erskine and by me, that the action, which had been commenced, would try the question : but this unfortunate circumstance occurred : the pleader took the Duke of Northumberland to be tenant \* in fee ; as he is represented by the Bill ; [\*283] and has averred him to be so in every plea. If the merits have not been tried from the fault of the Plaintiff in equity, that presents a strong case for dissolving the Injunction ; and, unless some means of procuring a speedy trial can be insured, I will dissolve it.

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SEE, ante, the notes to S. C., 13 V. 236.

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(1) *Robinson v. Lord Byron*, 1 Bro. C. C. 588.

(2) *Bourne v. Taylor*, 10 East, 180 ; *Whitechurch v. Holworthy*, post, vol. xix. 213 ; 4 Mau. & Sel. 340.

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## ATTORNEY GENERAL v. BACKHOUSE.

[1810, Nov. 7, 8, 10.]

LEASE of Charity land for 80 years supported as to the Interest of a sub-lessee, upon a fair consideration, several years ago, and no notice, except that it was a Charity Estate.

As to the original lease, under the circumstances, the length of time, the surrender of a former lease, the terms of which did not appear, the rent reserved, and an expenditure, though not according to the covenant, equally beneficial, inquiries were directed; to ascertain, whether the lease was reasonable; or unreasonable in such a degree, that fraud could be inferred (a).

No instance of the plea of purchase for valuable consideration, without notice, without an averment, that the party purchased from a person, seised, or pretending to be seised in fee, [p. 240.]

A lease of Charity Land for ninety-nine years, as a mere husbandry lease, upon terms, and at a rent, adapted to a lease for twenty-one years, not allowed: nor a building lease for nine hundred and ninety-nine years upon an expenditure, commensurate to a term of ninety-nine years, [p. 291.]

Purchaser of a lease, though not considered a purchaser for valuable consideration without notice to the extent of not being bound to know, from whom the lessor derived his title, is not to take notice of all the circumstances, under which it is derived, [p. 293.]

Therefore understood to have notice, that the lessors were trustees for a Charity; not, that the lease was bad; that depending on circumstances *débors* (b), [p. 293.]

THE Information stated, that the surviving trustees of a charity for the benefit of the poor of the parish of Chipping Barnet, being in that character seised in fee of a messuage and out-buildings and nine acres of meadow land, in the parish of Edmonton, by indentures of lease, dated the 4th of April, 1775, in consideration of the surrender of a term, of which twenty-one years were unexpired, and of the rent reserved, and covenants on the lessee's part to be performed, demised to John Goad, his executors, administrators, and assigns, the said messuage, lands, and premises, with an exception of all trees, to hold for the term of eighty years, at the annual rent of 46*l.*; with a clause of re-entry for non-payment of rent; and Goad covenanted, that he, his executors, administrators, or assigns, should within the first seven years of the term lay out 700*l.* in handsome and substantial buildings, to be erected on the \* said demised premises, or some part thereof (in lieu of the demised messuage, which it was thereby agreed should be pulled down) and should produce the bills and receipts, &c.

The Information, which was filed by the trustees of the Charity, appointed in 1802, against the executors of Goad and Backhouse, their *cestui que trust*, under his Will, charged, that the lease was made

(a) See 3 Sugden, Vendors & P. (6th Am. ed.) 162, [243.]

(b) But this rule only prevails in Equity; for although a purchaser has actual notice of a lease, yet if it be invalid, he may at law recover the possession from the lessee. *Doe v. Luffkin*, 4 East, 221; 3 Sugden, Vend. & P. 333, [473.]

A purchaser is supposed to have knowledge of the instrument, under which the party, with whom he contracts, as executor, or trustee, or appointee, derives his power. 1 Story, Eq. Jur. § 400; *Jackson v. Nealy*, 10 Johns. 374.

by collusion : the house was in good repair, when the lease was granted : and it would have been very imprudent to pull it down : it had not been pulled down ; and, though much neglected, was still worth repair ; that the rent reserved was inadequate ; and the covenant to expend 700*l.* was colorable ; that no such sum was expended ; nor any other sum except for the particular advantage and convenience of the occupier ; or the ordinary expenditure of a tenant for twenty-one years ; that Goad had committed great waste and devastation on the charity estate ; breaking up ancient meadow ; taking brick earth ; selling and converting the bricks to his own use ; dividing the land into small gardens and yards, attached to houses, belonging to himself ; and upon other parts of the charity land erecting stables and other offices, to suit the convenience of his own houses, adjoining the charity estate, very slightly built, so as not to endure near eighty years, to the great injury of the charity estate.

The Information prayed, that the Defendant Backhouse may be decreed to deliver up and surrender the lease ; and a reference ; to ascertain, what additional rent ought to be charged in respect of his occupation : but, if the Court shall be of opinion, that the lease ought not to be delivered up, then that the covenant may be specifically performed : an inquiry as to the waste and \* damage, [\* 285] &c. and an account against the executors of Goad.

The Answers, denying the charges of the Information, stated, that in 1775 Goad held the premises for the remainder of a term of one hundred and eleven years, granted by former trustees ; admitting the lease to Goad in that year ; and stating, that in 1777 Goad devised a part of the premises to Gurney for sixty-four years, at the rent of 35*l.*, with covenant to take down the old part of a messuage, called the Cherry Tree ; and to lay out 300*l.* in building substantial brick messuages and tenements ; and the sum of 470*l.* was expended in building by Gurney. Other part of the charity estate was land, at the back of other leasehold houses, belonging to Goad ; which he divided among those houses ; and built coach-houses, out-houses and stables, at an expense of 390*l.* Goad died in 1799 ; and the premises, comprised in the lease of 1775, and his other leasehold premises, were sold by his executors ; and assigned to the Defendant Backhouse ; who purchased them by auction for 700*l.*

The cause being set down at the Rolls, the Court intimated, that the assignee of Gurney's lease should be brought before the Court. Accordingly the Defendants Shepherd and his wife were made parties ; who by their Answer admitted, that the house had not been pulled down, according to the covenant ; stating their belief, that more than 700*l.* had been expended in improvements and building ; that the lease to Gurney in 1777 reserved to Goad, his executors, administrators, and assigns, until the new messuage should be built, the use of a cart-way ; that Gurney's lease was sold by his representatives to Hodgson ; and in 1796, after his death, was sold by auction to Smith, the former husband of the \* Defendant Sarah Shepherd, for 340*l.* ; insisting, that it is to

be presumed, that, when the lease was granted to Gurney, he had not, and at the times of the respective assignments to Hodgson and Smith they respectively had not, any notice of the lease, under which Goad derived his title, except that the premises were part of the charity estate; and therefore claiming under them, as purchasers for valuable consideration, without notice. At least the Defendant Shepherd, the husband, claimed as a mortgagee; having redeemed as a mortgage, made by his wife, to enable her to compound with the creditors of her former husband; insisting on the want of notice.

There was contradictory evidence as to the expenditure under the lease.

**Mr. Richards, Mr. Hart, and Mr. Shadwell**, for the Relators.—The Law is now settled by the cases, *The Attorney-General v. Green* (1), and *The Attorney-General v. Owen* (2), that such leases as this of a charity estate are *prima facie* bad; though under particular circumstances, an estate, for instance, consisting of buildings, requiring repair, or to be rebuilt, in order to secure a solvent tenant, a longer term may be granted than upon a common husbandry lease. This is an unnecessary grant in reversion, without benefit to the charity; whose interest was to be consulted. The lessee of charity land under such circumstances becomes a trustee for the charity. The right of re-entry in this lease is confined to the non-payment-of rent; not extending, as it ought, to failure in rebuilding, or to the breach of covenants, generally. Though there is no direct [\*\_287] notice to the sub-lessees, \*that this was charity land, there was enough to put them upon inquiry as to his title; which in this Court is equivalent to notice: the reservation of rent to him, his executors, administrators, and assigns, and all the covenants, with him, his executors, administrators, and assigns; the heirs never being mentioned; showing, that he was proprietor only as lessee; and therefore imposing upon those, who take under him, the duty of inquiring into his title (3).

**Sir Samuel Romilly and Mr. Johnson**, for the Defendant Backhouse: **Sir Arthur Piggott, Mr. Cooke, and Mr. Heald**, for the other Defendants.—The Defendants are purchasers, with notice of every thing, that appears upon the face of the lease; but no farther: not bound to inquire into collateral circumstances; or to presume, that, as the trust was for a charity, the lease granted was a breach of the trust. It is said, that the lessee of a charity estate is to be considered as a trustee for the charity; bound therefore, to make as good a bargain, as agent for the charity, as if acting for himself. That has never been stated; and the extent of such a rule must be considered. In no instance could a charity lease stand. The only rule, to be collected, is, that, when a lease is made by trustees of a charity under circumstances of gross improvidence, a plain clear breach of trust, the lessee cannot avail himself of that manifest breach of trust.

(1) *Ante*, vol. vi. 452; see the note, 453.

(2) *Ante*, vol. x. 555.

(3) See *Daniels v. Davison*, *ante*, vol. xvi. 249, and the references.

That is the full extent, to which these cases have gone : but this is an attempt to apply to them the principle, which governs the case of an attorney taking a lease from his client : a principle, embarrassing the transaction with so much difficulty, that it can hardly be maintained.

\* As to the objection, from the length of the term, can- [\*288] not trustees of a charity grant a building lease for eighty years ? That has not been determined ; though certainly it has been held, that a farm-lease, with the common husbandry covenants, cannot be granted by trustees for a charity for ninety-nine years (1), or a term of much less duration ; that it must be for the usual term upon such a lease. So a building lease for nine hundred and ninety-nine years cannot be sustained (2) ; as it is in effect parting with the property : the reversion being of no value, except on account of the rights, attached to a freehold. Are those cases authorities against a building lease such as this : with covenants to lay out so considerable a sum ? All the circumstances are to be taken into consideration. This lease was granted on the surrender of a former lease ; of which twenty-one years remained unexpired ; during which period therefore the charity could not have any additional benefit ; and the object was an immediate improvement of the estate by the application of 700*l.* in buildings upon the site of premises which were to be pulled down. The present trustees, though they must have the counterparts of the former leases, are silent as to the rent ; stating, that it was a less rent ; but not disclosing how much. Why is the Court to presume, that the benefit derived by the charity, was very inconsiderable : and to set aside a lease, at a rent of 46*l.*, the tenant paying the land-tax upon a mere suspicion of fraud ; and supported only by very imperfect evidence of the value, contradicted ; at this distance of time ; and against a purchaser ; who had no means of knowing the value so many years before ?

\* The mere omission of a covenant, making the lease [\*289] void, if the covenants were not performed, forms no foundation for holding this transaction a breach of trust ; to which the lessee is supposed to be a party merely by not insisting on that stipulation against himself. The mere fact, that the covenants were not performed, is not sufficient for this purpose : it must be established, that there was no intention to perform them ; and that there was no intention to lay out the sum of 700*l.* cannot be inferred from the evidence in this cause : the under-lease being granted long within the period stipulated, with a covenant to lay out 300*l.* ; and Goad appearing to have expended more than 400*l.* on the other part of the premises : above 1000*l.* being laid out by both ; not, it must be admitted, in the manner stipulated ; but the question is, whether this was mere color and fraud ; a pretence for a long term at a low rent. The application, that has been made, is much more advantageous to

(1) *The Attorney General v. Owen*, ante, vol. x, 556,

(2) *The Attorney General v. Green*, ante, vol. vi, 452,

the charity than the expenditure of 700*l.* upon a single house, according to the covenant. Coach-houses and stables, buildings indispensably necessary to adjoining valuable houses, the property of Goad, have been erected; and at the expiration of the lease the charity will have the advantage, resulting from the opportunity of renewing the leases of offices of such essential value to those houses; and though certainly the lessee had no right to make any variation from the contract, this view of the case is most material, as an answer to the imputation of fraud. The supposed injury by taking brick-earth above thirty years ago cannot now be made the foundation of setting aside the lease on the ground of fraud. It is much too late to bring forward such allegations against executors, in total ignorance of the transactions, and without any means of defence. In [\* 290] \* the last of these cases, *The Attorney General v. Griffith* (1), under-leases, with circumstances much stronger than these, were not disturbed.

Mr. Richards, in reply.—This is a lease for eighty years, of which fifty-nine constituted a new term: and it is clear, that, generally, a lease in reversion of a charity estate for fifty-nine years would be void; and the lessee, taking with knowledge of that breach of trust, would himself be considered as a trustee. It is incumbent on the Defendants to establish, that a transaction, which is *prima facie* a breach of trust, under the particular circumstances has not that character. They are bound to make out the consideration set up: the expenditure of 700*l.* in the manner stipulated. Time in such a case is nothing: the effect being merely that so long the charity has been plundered. No different rent is suggested by the answers; which do not lay any foundation for inquiry.

The Lord CHANCELLOR [ELDON].—There is no instance of the plea of purchase for valuable consideration, without notice, without an averment, that the party purchased from a person, seised, or pretending to be seised, in fee. I do not recollect any case, in which the Court has gone the length, pressed by the Counsel for the Information; and I should shrink from laying down the rule in an extent, not warranted by the cases, *The Attorney General v. Green*, *The Attorney General v. Owen*, and *The Attorney General v. Griffith*; as I understand those cases; that this Court will not [\* 291] allow \* trustees for a charity to make a mere husbandry lease for ninety-nine years upon terms, and at a rent, adapted to a lease for twenty-one years, and not improvable for a century: so, as to a building lease, upon the terms of laying out a sum of money, commensurate to a term of ninety-nine years; having regard to the state of improvement, in which the premises were to be placed, and let: if the lease is made for nine hundred and ninety-nine years, that is in effect a sale of the premises for a consideration, adapted to a term of ninety-nine years: but those cases have not gone this length; that a lease, made in consideration of the surren-

der of a former lease, the terms of which are in no degree explained, not even the fact, whether it was a lease, directly from the charity, as lessor, as it might be the estate of some person, given after the commencement of the lease, it is sufficient for the Attorney General upon an information, filed thirty-five years after the lease was granted, to state, that it is a lease for eighty years; and is therefore to be set aside; and to be set aside against persons, claiming under several mesne assignments. Suppose the application had been made in 1783, instead of 1803, and it had been said, that, having regard to the rent, and other circumstances, yet there was a manifest breach of trust upon the face of the instrument, if the former lease could not be affected, I could not have relieved against the latter without doing equity, by placing the Defendant in the same situation; restoring to him the increased rent, since 1775, and his remaining interest in the old term. I could not therefore have relieved without knowing the terms, upon which that lease was held, when it was made to him. I must learn, whether the lease was good, or bad, before I can say, what species of relief I am to give; whether there was in this original transaction that species of vice, which I should call a breach of trust; by which the first lessee, and those, who claim \* under him, ought to be affected; and their [\* 292] situations may be extremely different. The feelings of the Court upon the abuse of a charity estate must not carry it beyond what is just, even against those, who are guilty; much less against other persons; and upon that ground, the sub-lessees having given a fair consideration, and feeling the extreme hardship upon those, who have given a full consideration, the Decree must be mollified with regard to their interests; merely directing them to pay the rent to other persons than those, to whom they had contracted to pay it. The interests of those persons may be very fair, as between them and those from whom they take, and the relief in these cases is to be adapted to the conduct of the parties; as the Court finds them respectively to have acted fairly, or not, towards the trust.

There is no evidence, upon which I can say, Gurney's lease is not good as between him and Goad; if therefore the transaction as between Goad and the charity can be avoided, yet Gurney, having given a fair consideration and held undisturbed possession from 1775 to 1803, sales and mortgages having taken place without question for a period of thirty-five years, the interest of the charity itself upon all reasonable and equitable principles requires no more than that I should transfer to the charity the interest, acquired under that bargain. Upon the breach of these covenants, it is very difficult to say, what relief ought to be given. The real question upon that after so great a lapse of time is, whether the buildings erected, not being *eiusdem generis*, yet, if they are equally beneficial to the charity, as if they had been erected pursuant to the stipulation, this Court is to hold, that the charity shall have both those buildings and the price, due upon the principle of waste by the failure to perform the covenants.

Next, as to Shepherd's interest: he is the assignee of that lease; which therefore cannot be bad as to him, if it is good as to his assignor. It is not therefore necessary to enter into all this doctrine of notice. The effect here does not turn simply upon the expression "executors" instead of "heirs;" as indicating a chattel interest: but, though the purchaser of a lease has never been considered as a purchaser for a valuable consideration without notice to the extent of not being bound to know, from whom the lessor derived his title, I am not aware of any case, that has gone the length, that he is to take notice of all those circumstances, under which the lessor derived that title. These parties must be understood at least to have notice, that the lessors were trustees for a charity: but I cannot go the length, that the purchasers had notice, that this was a bad lease; that depending upon a number of circumstances *dehors* the lease. It is not however necessary to enter into that; as there is not enough to affect the lease to Gurney; and consequently not enough to affect the assignment to Shepherd, either as mortgagee or assignee; and under the circumstances, taking Gurney to have acquired an interest in the lease of 1775, with regard to which there were legal remedies, rights of entry, barred by the subsequent receipt of rent, and where it does not appear, that the benefit to the charity is not as much as if the covenants had been strictly performed, it is too much to say, that these interests are to be set aside. The questions, whether these interests are to be considered as taken for the benefit of the charity, or of Goad and his representatives, are very different: but I cannot enter into the consideration, whether the lease is bad, without inquiring, upon what terms and conditions Goad held it. There is more difficulty in the case of Backhouse, as to which I will draw out the minutes myself.

[\*294] \* Nov. 10th. The Lord CHANCELLOR [ELDON] directed an inquiry, whether the lease to Goad in 1775 was upon reasonable terms: having regard to the rent reserved, the money expended in building, or otherwise, and the duration of the lease: and if it should appear to the Master not to be upon reasonable terms, that he should state particularly the ground of such opinion; to the intent that the Court may judge, whether Goad ought to be permitted to hold against the charity. An inquiry was directed as to the buildings, &c. and it was declared, that the Court does not think proper under the circumstances to disturb the sub-demise to Gurney, or from him; reserving the consideration, whether the charity is to have the benefit thereof.

His Lordship added, that if the lease was unreasonable it must depend on the degree; whether it was unreasonable in a very trifling degree; or as it must be, in such a degree, that the Court may infer, that it was fraudulent.

SEE the note to *The Attorney General v. Green*, 6 V. 452.

## RODGERS v. MARSHALL.

[ROLLS.—1809, Nov. 16, 20.]

**DISTINCTION** as to supplying the want of a surrender between a lineal and collateral heir.

Not supplied for a child against a grand-child, unprovided for.

The Answer stating only, that the heir inherited no other land, an inquiry was directed, whether he has a provision; and as to the nature and extent of it. The want of surrender supplied in the case of a deed, as well as a Will; but upon the same principle as in the case of a Will, or the Execution of a Power; i. e. for, and against, the same persons.

THE Bill stated, that by indentures, dated the 2d of February, 1787, John Marshall, in consideration of the natural love and affection, which he had for his \*second son John Marshall the younger, and also in consideration of the sum of 200*l.* therein mentioned to be paid to John Marshall the elder by John Marshall the younger, declared, that he granted, bargained, sold and surrendered, unto John Marshall the younger, and his heirs, certain copyhold premises in the manor of Seaton, in the county of Cumberland, to hold to him, his heirs and assigns forever; according to the custom, &c.

John Marshall the elder died in 1796; leaving his grandson Joseph, the son of his eldest son Joseph, his heir according to the custom; and not having surrendered to the use of his Will. In July, 1797, a Commission of Bankruptcy issued against John Marshall the younger; and the Bill was filed by the assignees under that Commission; praying, that the Defendant may be decreed to surrender, &c.

The Answer represented, that no part of the consideration of 200*l.* stated by the deed, was paid; that it was a nominal consideration only; and it was understood, that the conveyance was to be in trust for such uses, as John Marshall the elder should by deed or Will appoint; and a deed of appointment was directed accordingly; but was prevented by accident; denying, that a surrender was prevented by the father's infirmity and weak state of health. The Answer farther stated, that the Defendant has not inherited any other land than this copyhold estate, to which he was admitted, as heir.

It was admitted, that there was no valuable consideration by actual payment; but from the evidence, principally that of the bankrupt, it appeared, that he was a creditor of his father by bills, accepted for repairs of a ship, and on other accounts, to the \*amount of 800*l.* or 1000*l.*; part of which having been [\* 296] paid by the freight of the ship, 500*l.* remained due at the date of the deed: but it was not stated, that the deed was made in consideration of that debt, or any part of it; or that there was any settlement of accounts. There was evidence of expenditure upon the premises by the bankrupt; and in support of the allegation, that

a surrender was prevented by the infirmity and weak health of the father.

Mr. *Richards* and Mr. *Bell*, for the Plaintiffs, relied upon the intention to make this conveyance, by a father to a son ; carried into effect so far as the execution of the deed ; if not supported by the consideration of 200*l.* part of the debt of 500*l.* due from the father to the son ; and money since laid out upon the estate, by the son upon the faith of the transaction, as proprietor ; insisting, that he was entitled as in the case of a defective conveyance, to have it completed by supplying the surrender, the only ceremony omitted ; suggesting also, that the heir may be amply provided for.

Sir *Samuel Romilly* and Mr. *Wright* for the Defendant, disputing the consideration, contended, that this equity of supplying a surrender was confined to the case of a Will ; and could not prevail against a grand-child, having no other provision.

The MASTER OF THE ROLLS [Sir *WILLIAM GRANT*].—Upon the evidence I cannot take this to be a conveyance for valuable consideration. The question then, is whether the defect is to be supplied ; as this is a conveyance for a younger son upon the consideration of love and affection ; and there certainly are cases of supplying the want of surrender upon a Deed, as well as a Will, for a younger [\* 297] child ; but upon the same principle as in the \*case of a Will, or the execution of a power : that is, for, and against the same persons. It is said, that is the case of a disinherited heir ; and it has been sometimes laid down, that the Court will not supply the defect against a disinherited heir ; or, as the phrase has been latterly, against an heir unprovided for : that is, without any provision. Here they have attended only to the former circumstance. The Answer states, that he inherits nothing, unless he is entitled to this estate ; but does not say, whether he is, or not, provided for in any other way. Some inquiry is necessary upon that point, whether he has any other provision : if not, I incline to think, that against a grand-child the want of surrender ought not to be supplied. The question has never been determined as to him ; though as against a collateral heir it has been held, that it shall be supplied (1).

An inquiry was directed, whether the Defendant has a provision, and as to the nature and extent of it.

A SURRENDER to the use of a testator's will is no longer necessary to give validity to his testamentary disposition of copyhold property : see statute 55 Geo. III., c. 192 ; but this, of course, leaves the question, whether a surrender shall be supplied in order to give effect to a *deed*, exactly where it stood before.

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(1) See, *ante*, *Fielding v. Winwood*, vol. xvi. 90, and the references, and the note, iii. 68.

## FEATHERSTONHAUGH v. FENWICK.

[ROLLS.—1810, APRIL 3, 4, 18.]

A PARTNERSHIP, without articles, and for an indefinite period, may be dissolved by any partner at any time, without previous notice: subject to the engagements of the partnership: but the existence of engagements with third persons cannot prevent the right of dissolution as among themselves (a).

The consequence of the dissolution of partnership, where there are no articles, prescribing the terms, is a general sale and account of the joint property: one or more partners therefore cannot insist on taking the share of another at a valuation; or, that he shall remove his proportion from the premises; thereby securing the Good-will (b).

Partner, after dissolution of the partnership continuing to trade with the joint property, must account for the profits (c).

Lease of premises, where a partnership trade was carried on, renewed by one partner in his own name clandestinely, a trust for the partnership; to be accounted for as joint property.

The interest, which a third party may have against the specific performance of a contract, may preclude the execution of it as between trustee and *cestui que trust*; as, where an insolvent tenant made over his lease to another; who treated for a renewal under a secret agreement in trust for the original tenant.

That agreement not executed against the landlord; and the principle, that a trustee shall derive no benefit from his trust, should fail, rather than be executed against a third party, so imposed upon; though, except for that interest, it would have been executed as between the other parties.

In the year 1783 the Plaintiff entered into partnership with George Fenwick, Clark and Faremond, in the business of manufacturing glass, for the term of fourteen years from the 13th of February, 1783. The articles contained a provision, that, in case any of the partners should at any time be desirous to dispose of their respective interests in the partnership, and should give twelve calendar months' notice thereof in writing, at the end of such twelve months the partnership should cease and determine, so far as concerned such partner, giving notice; and that the other partners, or any of them, should have the preference of purchasing the interest of such retiring partner at a fair valuation. By another clause it was provided, that at the expiration of the term the joint stock should be equally divided among the partners, their executors and administrators.

The business was at first carried on at Ayreskey, in the county of Durham: but afterwards they obtained a lease from Mr. Lambton of glass houses and premises at Panns, in the same county, and also of a free-stone quarry for the term of fifteen years from the 22d of November, 1789, as tenants in common; with \* a [<sup>\*</sup> 299] proviso, that, if the lessor, his heirs or assigns, should be desirous, that the furnaces, kilns, and other utensils, erected on the premises, should remain thereon after the expiration of the lease, three months' notice of such intention should be given previous to the expiration; and then they should be taken at a fair valuation; and, in case such notice should not be given, the partners might remove them.

(a) See, *ante*, note (a) *Peacock v. Peacock* 16 V. 49.

The partners worked the stone quarry upon the same terms, upon which the manufactory was carried on. At the expiration of the partnership, on the 13th of February, 1797, all the shares were by purchase vested in the Plaintiff and George Fenwick; who became interested in equal moieties; and continued to carry on the business, as usual, without any new agreement. In June, 1799, they took a lease for the partnership purposes of a warehouse in London for a term of nine years. In 1801 Addison Fenwick, the son of George, was admitted to a moiety of his father's interest in the concern; and was appointed a manager with a salary. They also occupied a brick-field, contiguous to the glass-works, as tenants from year to year under Mr. Lambton, until 1805; the profits of which were brought to the partnership account.

In September, 1804, George and Addison Fenwick applied to Mr. Wilkinson, one of the trustees and guardians of Mr. Lambton's infant son and devisee, for a renewal of the lease of the premises at Panns; making the application in their own names, without any communication with the Plaintiff; with whom it was represented that George Fenwick was determined to have no farther connection in

trade, not having at that time apprised him of their intention to dissolve the partnership. An \*agreement was accordingly executed by them and Wilkinson for a renewal

[\* 300] of the lease to them exclusively, for the term of eight years from the 22d of November following. On the 19th of October, 1804, the Fenwicks first informed the Plaintiff, that they had obtained that renewal; and gave him verbal notice of their intention to dissolve the partnership on the 22d of November following; and on the 15th of November they gave him a written notice to that effect. At this time various contracts, entered into by Addison Fenwick in the name of the partnership with glass manufacturers and other workmen, for long terms of years, were still subsisting; and in May, 1804, he purchased in the partnership name a large quantity of kelp; though the stock then in hand was more than sufficient to last till November. The Defendants, the Fenwicks, offered to take the contracts with the workmen off the Plaintiff's hands; and to give him an indemnity; or to divide the workmen. They also offered to take the partnership property and utensils at a valuation; and desired the Plaintiff, if he would not comply with that proposal, to take his share off the premises; and the Plaintiff refusing, they continued the business with the partnership machinery, stock of kelp and workmen.

The Plaintiff, having filed the Bill, died; and the suit was revived by his representatives. The Defendants insisted, that the partnership was duly dissolved; that they were only accountable for the value of the partnership property at the time of the dissolution; and that it was not necessary for them to inform the Plaintiff of their intention to dissolve the partnership, or to apply for a renewal of the lease; and the questions were, 1st, whether under the circumstances the partnership was duly dissolved: if it was, 2dly, whether the Defendants were not accountable for the profits, derived since by

means of the partnership property ; 3dly, whether the renewed lease was not taken in trust for the partnership.

Wilkinson, and Murray, his solicitor, being examined by the Defendants, stated, that the Plaintiff was for many years employed as one of the coal agents of the Lambton family, until September, 1803 ; when Wilkinson discharged him on the ground, that he had taken a colliery, contiguous to those of Mr. Lambton ; and therefore was not likely to do ample justice to the latter ; as agent to which he had also the command of large sums of the trust money. For these reasons, though there was no allegation of misconduct, the Plaintiff was discharged from the agency ; and Wilkinson informed him, that he should not have any communication in future with the trust estates. He also received notice to quit some lands which he held under the trustees as tenant from year to year. Wilkinson farther stated, that he would not have granted a renewal of the lease at Panns to the Plaintiff, either separately, or jointly with other persons ; that he came to that resolution in September, 1803 ; that it was a deliberate and final resolution ; and was publicly known in the neighborhood, where the Plaintiff resided.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Simpkinson*, for the Plaintiff.—1st. The business having been carried on, after the expiration of the term, fixed by the articles, in the same manner, this Court will hold, that the original terms were to be observed ; and therefore the partnership could not be dissolved without twelve months' notice, according to the original stipulation. Where a partnership concern is carried on, after the expiration of the original term, without any new agreement, the conclusion of law is, that it proceeds upon \*the old footing ; as a tenant, continuing the occupation of a farm after the expiration of his term, holds subject to all the covenants in the old lease. From the nature of this covenant it could not be determinable at pleasure ; and the conduct of the parties, the lease taken of the warehouse in London, the contracts with the workmen, and the purchase of the additional stock of kelp, show, that it was not so considered. The notice of dissolution therefore is not sufficient.

2dly. Taking the partnership to have been duly dissolved, the whole of the joint property ought to have been sold at that time. The Defendants had no right either to appropriate it to their own use, at their own price, or to insist, that the Plaintiff should take away his proportion. That is not the mode of winding up a partnership, according to *Fox v. Hanbury* (1) and *Crawshay v. Collins* (2). These Defendants therefore, having continued the business by means of the partnership property, must account with the Plaintiff for the profits.

3dly. The rule is established, that, if a trustee, or a person, having a particular interest in a lease, obtains a renewal, it shall be for the

(1) Cwyp. 445.

(2) *Ante*, vol. xv. 218.

benefit of all persons, interested in the old lease ; *Palmer v. Young* (1), *Keech v. Sandford* (2), *Rawe v. Chichester* (3), *Owen v. Williams* (4). In this respect a partner is in the same situation as any other person. The evidence of Wilkinson is not, that he refused to renew to the partnership ; or, that the Plaintiff was ever informed of his resolution ; and Wilkinson's refusal could not have had effect, unless the

Plaintiff, being informed of it, consented to the Defendants [\* 303] treating for their own benefit ; according to *Keech v. Sandford* ; recognized in *Blewitt v. Millett* (5). The occupation of the brick-field by the Plaintiff and Defendants, as tenants from year to year, permitted by Wilkinson until 1805, is inconsistent with the resolution he represents himself to have formed in 1803 ; and the Defendants could not, as they pretended, have been convinced that an application for renewal on the joint account of themselves and the Plaintiff would have been refused.

Mr. Hart, Mr. Leach, and Mr. Wear, for the Defendants.—If the partnership had originally commenced without articles, it might have been dissolved at a moment's notice ; and the same rule prevails, where after the expiration of the period, originally stipulated, the business is by mutual consent continued. That rule, which, whatever may have been held formerly, is now settled by the late case of *Peacock v. Peacock* (6), was adopted, to obviate the inconvenience, resulting from the question, what is reasonable notice ; and to prevent endless litigation ; as that question in each particular case must have produced a suit. The clause in these articles can apply only to the limited term. It is merely an enabling clause ; empowering any of the partners to retire during the continuance of the term. The case of a tenant, holding over after the expiration of his term, has no analogy ; and in that instance, if the lease had contained a clause for determining it at twelve months' notice, yet, after the expiration of the term, the tenant continuing in possession as tenant from year to year, six months' notice would be sufficient. The general [\* 304] rule cannot give way \* to the inconvenience of the particular case, from the quantity of kelp laid in, the contracts with the workmen, and the lease of the warehouse. The argument upon those circumstances proves too much : viz. that the partnership must continue during the whole period of these contracts ; if for instance a lease had been taken for ninety-nine years, the partnership must have had the same duration.

2dly. This case is not within the principle of *Crawshay v. Collins* (7) ; where the Lord Chancellor held, that, if after dissolution some of the partners continue to use the partnership effects for other pur-

(1) 1 Vern. 276.

(2) Sel. Cas. in Ch. 61.

(3) Amb. 715.

(4) Amb. 734.

(5) 7 Toml. P. C. 367.

(6) *Ante*, vol. xvi. 49.

(7) *Ante*, vol. xv. 218.

poses than that of winding up the concern, they are accountable for the profits. These Defendants were compelled by the Plaintiff's conduct to use this property. He did not object to their offer, as improper: but insisted, that the partnership was not dissolved. The stipulation in the articles respecting the division of the stock at the expiration of the partnership was still in force; and the correct principle is, that, where partnership property is capable of division, it shall be divided, and not sold.

Upon the third point, this case is distinguished from those, which have been cited; and under the circumstances, attending to the evidence, the Defendants were at liberty to treat on their own account, without giving notice to the Plaintiff; who must have been apprised of Wilkinson's determination. Even taking it to be a trust, a specific performance would not have been decreed against Wilkinson upon a Bill by the Plaintiff: *Phillips v. The Duke of Bucks* (1), *Eyre v. Popham* (2). Considering the lease to have been obtained in trust, the partnership does \*not continue: the parties [\* 305] are merely tenants in common; and the consequence would be, that a rent must be set upon the premises during the occupation of the Defendants.

Sir *Samuel Romilly*, in reply.—Upon the question as to the renewal of the lease the principle of equity is established by *Rawe v. Chichester* (3) and many other cases; that the renewal of a term, in which there are several interests, obtained by one party without communication with the rest, must be considered as taken for the benefit of all. Upon that point the case of *Keech v. Sandford* (4) is a direct authority against the Defendants; and though that was the case of an infant, the principle, depending upon a breach of good faith, is equally applicable to this case. The particular circumstances however are relied on, as taking it out of that general principle: that Wilkinson, acting on the part of himself and the other trustees of Mr. Lambton, would not have granted a lease to the Plaintiff jointly with the Fenwicks: but the effect of the evidence amounts to no more than a determination by Wilkinson, one of four trustees for an infant, that the Plaintiff should no longer act as agent to the trust estates; under an apprehension of the effect from an interest he had taken in a rival colliery. There is no evidence, that he was informed, that Wilkinson would not grant him a renewal; and clearly the Defendants ought to have informed him of their intention to dissolve the partnership in November 1804, before they applied for a renewal. If he had received that information, he would have had an opportunity of representing to the trustees the injurious effect of their determination; \*and of proposing some mode of obviating their apprehensions. [\* 306]

With regard to the question of dissolution, though in *Peacock v.*

(1) 1 Vern. 227.

(2) 1 Bro. C. C. 95, n.

(3) Amb. 715.

(4) Sel. Cas. in Ch. 61.

*Peacock* (1) it was decided, that a partnership for an indefinite time may be dissolved immediately, great doubt had prevailed upon that point previously ; and that case had no special circumstances. The lease being renewed, (if that agreement is to be considered as obtained in trust), and these workmen being hired for considerable periods; during which the partners were bound by articles to employ them, how can those contracts be avoided ? The proposal to the Plaintiff upon that subject was unfair ; and their mode of treating him was perfectly unauthorized. Their conduct led him to conclude, that the concern was to proceed, as it had been previously carried on. A short time before they had purchased a large quantity of materials for this manufacture, which could not have been worked up within the limits of the subsisting term. What would be the conclusion of a jury upon this proposal ; that the Plaintiff, being indemnified against the contracts, should take his proportion of the workmen and materials ; and seek a place for establishing another manufactory : they remaining on the spot with all the rest ; and by their clandestine agreement gaining this great advantage; securing to themselves the whole of the good-will ? Though the distinction as to notice between partnership for definite and an indefinite periods must be admitted, the provision by the original articles, requiring a year's notice even to enable one to withdraw, shows the judgment of the parties, that the engagements of the concern would demand a considerable time to bring them to a conclusion ; and must [\* 307] be taken \*as the construction of their intention in the event of a total dissolution ; which the existence of these contracts must therefore preclude without at least the same notice.

The right to hold the Defendants accountable, as trustees, for the profits of the business, carried on with the partnership property; and the renewed lease, is established by all the authorities, from *Brown v. Litton* (2), the case of the mate of a ship, trading with the money of the deceased captain, down to *Crawshay v. Collins* (3).

1810, April 18th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The first question in this cause is, whether the partnership was dissolved on the 22d of November, 1804. The Plaintiff contends, that the Defendants had no right to put an end to the partnership at that period ; and that is contended on several grounds: first; that, as by the articles, which formerly existed, but had expired, twelve months' notice was necessary to enable a partner to withdraw, the same notice was necessary for withdrawing from the partnership, which continued without articles. I do not agree to that proposition. The latter partnership was for an indefinite period ; and therefore might be dissolved at the will of the parties ; subject to the question, afterwards made, by what notice that Will must be declared.

Another ground, on which the Plaintiff contends against the dis-

(1) *Ante*, vol. xvi. 49; see the note, page 50.

(2) 1 P. Will. 140.

(3) *Ante*, vol. xv. 218, see the references.

solution on the 22d of November, is, that the lease of the premises in London, used in carrying on the concern, was then unexpired. That does not oppose any obstacle to the dissolution; as it is not a necessary consequence, that partners, taking premises for the use of \* their trade for a definite period, contract a [\* 308] partnership for the same period. If any part of the term is unexpired at the end of the partnership, that is partnership property; and is to be distributed as such; but I do not apprehend, that they are bound to continue the partnership on that account (1).

A third ground is, that there were several contracts, subsisting with their workmen, which had a considerable period of time to run. That argument goes considerably too far. It would go to this extent; that a partnership could not be dissolved, until all their contracts were completely ended and wound up; and that can hardly be the case at any period; as persons are entering into contracts from day to day; which cannot all expire at the same period. It would on that ground be hardly possible to dissolve any partnership; as there must always be contracts depending. I do not conceive therefore, that the existence of engagements with third persons, either for goods to be worked up, or engagements with their workmen, which had not come to a conclusion, can form an objection to the dissolution. The partners cannot, it is true, by a dissolution relieve themselves from the performance of any engagements, which they may have contracted with third persons: but, as among themselves, the existence of such engagements cannot prevent a dissolution either by mutual consent, or by notice.

The question then is, what sort of notice ought to be given for this purpose. Until a very recent period it had been, I believe, understood, that a reasonable notice should be given: but upon the question, what is reasonable notice, much difference of opinion may prevail. On the one hand, it may be extremely disadvantageous to parties to say, that a partnership shall be dissolved on a given day: on the other it must be extremely difficult for a Court of

\* Equity by a general rule to ascertain, what is reasonable [\* 309] notice; and the question, whether the particular notice was reasonable, or convenient, would be the subject of discussion in almost every instance of the dissolution of a partnership. Considerations of that sort, I believe, have led to a different rule; that in the case of a partnership, such as this, subsisting without articles, and for an indefinite period, any partner may say, "It is my pleasure on this day to dissolve the partnership:" but, considering the principles, on which the dissolution must take place, a partner can very seldom, if ever, have an interest to give notice of dissolution at a period, disadvantageous to the general interests of the concern; as where the articles do not prescribe the terms, the Law ascertains, what shall be the consequence of dissolution: viz. that the whole of

(1) See, *ante*, *Hammond v. Douglas*, vol. v. 539, and the note, 540.

the joint property must be sold off; and the whole concern wound up. No partner therefore can derive a particular advantage by choosing an unseasonable moment for dissolution; as upon the principles, established in *Crawshay v. Collins* (1) and the authorities, there referred to, he must suffer in proportion to the extent of his interest in the trade. I hold therefore, that the dissolution of this partnership took place on the 22d of November.

The next consideration is, whether the terms, upon which the Defendants proposed to adjust the partnership concern, were those, to which the Plaintiff was bound to accede. The proposition was, that a value should be set upon the partnership stock; and that they should take his proportion of it at that valuation; or that he should take away his share of the property from the premises. My opinion is clearly, that these are not terms, to which he was bound [\* 310] to accede. They had no more right to turn \* him out than he had to turn them out, upon those terms. Their rights were precisely equal; to have the whole concern wound up by a sale, and a division of the produce. As therefore they never proposed to him any terms, which he was bound to accept, the consequence is, that, continuing to trade with his stock, and at his risk, they come under a liability for whatever profits might be produced by that stock. In the case of *Crawshay v. Collins* (2) there was no circumstance, except merely, that there had been no adjustment of accounts with the assignees of the bankrupt: here the Defendants proposed adjusting the accounts on certain terms; but terms, which the other party was not bound to accept. Though he, thinking they had no right to dissolve the partnership, might not have gone into any detail of the principles, on which the dissolution should take place, yet I conceive it to have been their duty in the first place to put themselves right by offering to him those terms, upon which the law gave him a right to insist; and, not having done so, but, continuing to trade with his stock under the liability to answer for the profits, the same inquiry should be directed as, in *Crawshay v. Collins* (2); to ascertain, what that stock was at the period of the dissolution, on the 22d of November; what use was afterwards made of it; and what profits were produced by the trade.

There is still remaining what I consider a separate question; whether the renewed lease formed any part of the partnership property at the time of the dissolution. That is the only view I take of this question. Sir Samuel Romilly seemed to think, that, if it formed part of the partnership property, the consequence would be, that the partnership was not dissolved. For the reason I have already given I think, that consequence would \* not follow: but, supposing the lease to have been renewed on the 22d of November, and that the Defendants are to be considered as trading for the Plaintiff under that renewal, the consequence is, that the

(1) *Ante*, vol. xv. 218.

(2) *Ante*, vol. xv. 218.

renewed lease was partnership property from the 22d of November. It is clear, that one partner cannot treat privately, and behind the backs of his co-partners, for a lease of the premises, where the joint trade is carried on, for his own individual benefit: if he does so treat, and obtains a lease in his own name, it is a trust for the partnership; and this renewal must be held to have been so obtained. Consider, what an unreasonable advantage one partner would upon a different principle obtain over the rest. In this respect there can be no distinction, whether the partnership is for a definite, or indefinite, period. If one partner might so act in the latter case, he might equally in the former. Supposing the lease and the partnership to have different terms of duration, he might, having clandestinely obtained a renewal of the lease, say to the other partners, "the premises, on which we carried on our trade, have become mine exclusively; and I am entitled to demand from you whatever terms I think fit, as the condition for permitting you to carry on that trade here."

Is it possible to permit one partner to take such an advantage? When the application was made for a renewal, no notice of dissolution had been given; nor had the Plaintiff notice of any intention of renewing the lease. It is not true, as has been represented, that the impediment to a renewal to the partnership arose solely from the indisposition of Mr. Wilkinson to any connection with the Plaintiff: as, before any objection had been made on that, or any other, ground, the Defendant goes with the intention, and for the direct purpose, of obtaining a renewal for himself and his son exclusively. He \* makes the application to Murray; who [\*312] says, the proposal was for a renewal for the benefit of the Defendants; expressly excluding the Plaintiff; with whom, it was represented, that George Fenwick was determined to have no farther connection in trade; and though it may be true, that Wilkinson afterwards said, he would not have granted a lease to the Defendants jointly with the Plaintiff, that declaration had become quite unnecessary by the resolution, previously expressed by the Defendant, not to take a lease jointly with him.

This clandestine conduct was very unfair towards the Plaintiff. The Defendants had not intimated to him, that they would not have any farther connection with him; and that they intended to apply for a lease on their own account. They ought first to have given him notice; and to have placed him on equal terms with them; and then, if Mr. Wilkinson had thought proper to give them the preference, the case might admit of a different consideration. Instead of that they clandestinely obtained an advantage, which would enable them to dissolve the partnership on terms, very unfavorable to the Plaintiff; and they evidently had that object in view. If they can hold this lease, and the partnership stock is not brought to sale, they are by no means on equal terms. The stock cannot be of equal value to the Plaintiff; who was to carry it away; and seek

some place, in which to put it, as to the Defendants ; who were to continue it in the place, where the trade was already established ; and, if the stock was sold, the same circumstance would give them an advantage over other bidders. In effect they would have secured the good-will of the trade to themselves in exclusion of their partner.

Then does the circumstance, that Wilkinson was unwilling to admit the Plaintiff into the agreement for a renewal, make [\* 313] \* any difference. I think, it does not ; as it is no injury whatsoever to him, or any other of the trustees of Mr. Lambton, to declare the Defendants trustees of this property for the Plaintiff. There may be cases, where the interest, which a third party may have against the specific performance of an agreement, would preclude the execution of it, as between *cestui que trust* and trustee ; as in a case (1) before Lord Redesdale : an insolvent tenant made over his lease to another person ; who treated with the landlord for a renewal, to himself ostensibly, but under a secret agreement in trust for the original tenant. Lord Redesdale held, and very justly, that he would not execute that agreement as against the landlord ; forcing upon him a tenant, whom he never would have chosen ; and unable to execute the agreement, into which the ostensible tenant had entered ; and therefore the principle, that a trustee shall derive no benefit to himself from the trust, should fail, rather than be carried into execution against a third party, not apprised of the secret engagement ; and imposed upon by the default of him, who claimed as the *cestui que trust* : but Lord Redesdale said, if the farm had been occupied by the trustee, the Court must have held him to be accountable for the profits ; that, as between them, there was no reason for not carrying the trust into execution : the interest of the landlord was the only impediment.

It is not necessary here to determine, whether I would, or would not, have decreed Wilkinson specifically to perform the agreement for a lease, in which the Plaintiff was to be one of the tenants : [\* 314] but I have no difficulty in declaring, that under the circumstances, in which this new agreement was made, I can without injury to any third party decree, that this lease must be considered as taken for the benefit of the partnership ; and was therefore partnership property at the time of the dissolution. The effect will not be to consider it as partnership stock ; so as to entitle the Plaintiff to all the profits, that might be made during the continuance of the lease ; as it is not stock, employed, and producing profit, in the same sense as the other stock ; if he is entitled to an allowance in respect of his share of these premises, it does not follow, that I should hold him entitled to a share of all the concerns, carried on there. I consider him as having an interest in the premises, in which the trade was carried on, to this extent only ; that in taking an account of the value of the partnership stock, as it existed on

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(1) *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123.

the 22d of November, this lease is to be included in the estimate of value as part of the joint property.

The principle, upon which the account is to be taken, is all, that can be settled at present: the result will be the subject of farther directions.

An account was accordingly directed of the partnership property upon the 22d of November, 1804: the renewed lease to be considered as partnership property; and to be sold; with the same inquiry as in *Crawshay v. Collins* (1): viz. whether there were any, and what, profits, made since the 22d of November, 1804, by any, and what, use or application of, or by means of, the stock in trade and capital of the partnership business; as the Master finds \* the same to have been constituted: the Master to be at [\* 315] liberty to state specially, at the request of any party any circumstances, relative to the stock and capital, existing on the 22d of November, 1804; or as to any profits, made, or alleged to have been made, since such time: the Master to make a separate Report as to what the partnership property now consists of: with liberty to apply upon the separate Report; reserving farther directions.

1. THAT a partnership, of which the continuance has not been defined by express contract, may be put an end to whenever any of the partners shall think fit, see, ante, note 2 to *Crawshay v. Collins*, 15 V. 218.

2. Profits made by continuing to deal with what once was joint stock, after the dissolution of the partnership, must be accounted for; the party whose property has been exposed to responsibility and probable loss must participate in the actual profits: *Crawshay v. Collins*, 1 Jac. & Walk. 279; *Brown v. De Tastet*, Jacob's Rep. 296.

3. That a renewed lease of property demised to a firm, obtained by one party, must, generally speaking, be considered as a graft upon the original lease for the equal benefit of all the partners, see notes 1, 2, to *Moody v. Matthews*, 7 V. 174.

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(1) *Ante*, vol. xv. 218.

## ADLEY v. THE WHITSTABLE COMPANY.

[1810, Nov. 9, 12.]

As to the validity of a By-law of the Corporation, the Company of Whitstable fishermen, that any freeman, engaging in any other oyster fishery on the coast of Kent, should forfeit 10l. and until payment should be excluded from all share of the profits, which should in the mean time be divided, as if he had wholly ceased to be a freeman, and whether such suspension is open to a *Mandamus*, as a temporary disfranchisement, *Quere*.

Jurisdiction in Equity against a Corporation, in nature of a partnership, in favor of a member, as well as a stranger, by an account of the profits, where there is no remedy, or not a complete remedy, at Law (a), and the difficulty of executing a Decree from the peculiar circumstances and nature of the property will not prevent it; though that may be a ground of some modification; for instance, not recalling profits, already distributed; as an account is directed in a limited way, dispensing with vouchers, &c. upon the objection from length of time.

No instance of a By-law, restraining the individual members of the Corporation from being concerned, either in any other place, or within given limits, in the same trade. By-law, even in restraint of trade to a certain extent, which would not have been good under the authority of Charter, may be good by custom, [p. 322].

Distinction between Charter and contract, [p. 322].

That, which may be the subject of contract between the different Interests in a partnership, might not be good as a By-law: for instance, an agreement among the Citizens of London, who have as extensive a power of making By-laws as any Corporation, not to sell, except in the markets of London, would be good; though a By-law to that effect has been declared bad by the Legislature, [p. 322].

THE Company of Free Fishers and Dredgers of Whitstable, in the County of Kent, were incorporated by Act of Parliament (1); and according to the custom of conducting their Oyster Fishery, and dividing the profits, every member during the season for dredging oysters either personally, or by deputy, was obliged on [\* 316] certain \* days, appointed by the foreman, the principal officer of the Company for the time being, to dredge, and deliver for the benefit of the Company, a certain quantity of oysters, according to his direction, called a stint; receiving from the foreman a certain sum for the day's work. The money, produced by the sale of the oysters was applied first, in discharge of the interest of the Company's debts; and the residue was divided among the members.

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(a) Mr. Fonblanche asserts that Courts of Equity, when resorted to for the purpose of an account of *meane* profits, will, in many cases, consult the principle of convenience; and will, therefore, sometimes decree it, where the party has not already established his right at law. 1 Fonbl. Eq. b. 1, ch. 3, § 3, note (R). To some extent, it is said by Mr. Justice Story, he is borne out by authority, as in cases of shareholders in real property of a peculiar nature (such as the shareholders in the New River Water Works in England). But there is great reason to question, whether the doctrine is generally admissible, as a rule in Equity, resulting from mere convenience. It seems rather to result from the peculiar character of the property, where there are many proprietors, in the nature of partners, having a common title to the profits; and, therefore, the whole becomes appropriately a matter of account. 1 Story, Eq. Jur. § 509.

(1) Stat. 33 Geo. III. c. 42.

On the 22d of July, 1805, at a Manor Court—an order or by-law was made; declaring, that, if any freeman should engage in the business of sending oysters to market for sale from any oyster grounds on the Kentish shore, or work the same, &c. other than the oyster grounds of the Company, such freeman should forfeit 10*l.* for the use of the Company; and if he should refuse to pay the fine to the Water-Bailiff of the manor for twenty-four hours after demand, such freeman, so neglecting or refusing, should from thenceforth, and until such fine be paid, be wholly excluded from all share of the profits, to be made thereafter by or from the joint trade in oysters of the freemen of the Company; and such profits should in the mean time be divided, as if such freeman, so neglecting, or refusing, had wholly ceased to be a freeman of the said Company, &c.

The Plaintiff, a freeman of the Company, was at the time of their Incorporation, and had ever since continued to be one of the co-lessees under the Dean and Chapter of Canterbury of another oyster ground, on the Coast of Kent, called The Sea Salter Ground; and the Bill stated, that as such freeman on the 29th of October, 1805, he performed his stint, or day's work in the Company's Fishery; and delivered the oysters according to the custom; and thereby became entitled to receive from the foreman the sum of six shillings; which sum, though \* demanded, was refused [<sup>\*317</sup>] by the foreman under the by-law, until the fine of 10*l.* incurred by the Plaintiff, as holding and working another oyster-ground on the coast of Kent, should be paid; and payment of the fine was demanded; and refused by the Plaintiff. The Bill insisting, that the by-law was invalid, that the Plaintiff was not summoned to attend, and had no notice of any complaint against him, &c. prayed an account of the profits, &c.

The Defendants insisted on the by-law.

Mr. Richards, Sir Samuel Romilly, and Mr. Toller, for the Plaintiff.—This is a Bill, filed by a member of a trading company, entitled to a share of the profits; praying an account. The objection is, that he has ceased to be a member under the effect of a by-law. There is no doubt of the jurisdiction of this Court upon the validity of a by-law, coming incidentally before it. A Corporation of this nature is but a more extended partnership; the right therefore in equity to an account of profits withheld is clear.

Then, as to the validity of this by-law, it was passed under extraordinary circumstances. An indefeasible right in these profits is acquired by seven years' labor of a member, or his parent. Can a person, having acquired that heritable right, be deprived of it at the pleasure of the other members? The fact that the Plaintiff had become a co-lessee of another valuable fishery, was notorious; and there was no imagination, that on that account he was incapable of becoming a member of this Corporation. Being admitted a freeman in 1792, he filled that situation, and enjoyed the privileges annexed \* to it, until this law was made, at the distance of [<sup>\* 318</sup>] thirteen years.

The Company had no right to make this by-law. There must be many persons, who cannot be affected by it: for instance the widow, or the son, of a Corporator. It affects those persons only, who have interests in another fishery, upon the coast of Kent: there being only two: this of The Sea-Salter Company; and the fishery, common to all, called The Flats. There is clear evidence therefore, that this by-law is partial and unjust; not intended for the good of the Company: but directed against the Plaintiff alone; who is the only one interested in that other fishery: not prohibiting those, interested in any fishery, except upon the coast of Kent, from dredging here for oysters.

This by-law, however, if it could be represented as calculated for the benefit of the Corporation, cannot be sustained. It is a law *ex post facto*, and clearly in restraint of trade; preventing their trading in any other place, generally. Could a by-law, restraining the members from carrying on the business of a banker, &c. in any other place, be maintained? The penalty imposed is ordered to be paid within twenty-four hours; and, if not paid within that time, from that moment the proportion of the profits, which would have been payable to that member, becomes divisible, as if that person had ceased to be a freeman. Under these circumstances, this being in the nature of a partnership, the Plaintiff is clearly entitled to an account of the profits, in which he, as a partner, was entitled to participate, notwithstanding this unjust attempt to exclude him, and distribute the whole among the other members.

[\* 319] \* The Lord CHANCELLOR [ELDON].—Suppose, when this by-law was made, the Plaintiff had been the sole lessee under the Dean and Chapter of Canterbury of The Sea Salter Fishery, with a covenant not to assign without license: he could have no option.

*For the Plaintiff.*—If a share of that fishery had devolved upon the widow of a member of this Corporation, she would have no option; but must by the necessary effect of the law be deprived of the one or the other.

Sir Arthur Piggott and Mr. Bell, for the Defendants.—The Plaintiff, becoming a member of this Company, cannot complain of the rules and regulations, to the observance of which he has voluntarily bound himself, sanctioned by fines, or a suspension of rights, as a member. If he conceives himself to be injured, he is bound to resort to the special remedy; excluding the jurisdiction of this Court to give an account of the profits. A case, in which this Court would interfere, cannot be represented. The profits have been invariably divided, without an instance to the contrary, as stated in the Answer, according to the custom and usage of this Corporation, sanctioned by the Act of Parliament (1); and the members have bound themselves to take the account, so given. The account, prayed by this

(1) Stat. 33 Geo. III. c. 42.

Bill, would be attended with the highest inconvenience ; and will produce many such suits. It is easy to conceive the reason of excluding the members of an adjoining Oyster Company ; to guard \* against frauds, which it would have been difficult [\* 320] to detect. The Dredging Court are the only competent Judges, what it was proper upon a view of the finances of the Company to divide as profit. The right is merely suspended during contumacy ; and is restored by payment of the fine. The validity of the by-law is a proper subject for the consideration of a Court of Law. Restraints of trade are very usual : especially in articles between bankers ; and upon purchases of good-will. The case of a member of this Company, deriving an interest in another fishery, as representative, has no hardship : being the necessary effect of their own act. There is no instance of an account directed here under the Bill of a member of a Corporation of the profits, belonging to the Corporation itself, and not held upon any trust ; excluding the case of an information by the Attorney General ; and from the singular nature of this Corporation, with reference to the nature of the property, from which the profits arise, the Court would have had considerable difficulty in executing its Decree. The utmost right of the Plaintiff here is a discovery ; to enable him to go to law ; where he might recover all, that he is entitled to, in an action against the foreman : but there is another objection ; that the profits, which he claims, have been actually distributed. The application of the Plaintiff to the Court of King's Bench (1) failed upon the distinction, that this was, not a disfranchisement, but a mere suspension of the right to acquire profits.

The Lord CHANCELLOR [ELDON].—Suppose, the twelve jurymen of the Manor Court had made a by-law, that the profits of the next year should be \* distributed among themselves exclusively ; not disfranchising any one : it would be a strong proposition, that no Court has jurisdiction upon that : yet all these arguments would apply in that instance. The object of this by-law seems to be, to raise the difficulty about jurisdiction ; excluding the Court of King's Bench. If the consequence of this management is, that a Court of Law cannot enter into the validity of the by-law, the question is, whether this Court will not hold jurisdiction for the purpose of sending that question to a Court of Law : otherwise the most unreasonable thing might be done without a remedy in any Court.

Mr. Richards, in reply.—Admitting, that an application for a *mandamus* could be maintained, the Court of King's Bench could do no more than a partial act ; giving a remedy perhaps as to the stint, &c. : but still the account in this Court would be necessary ; without which nothing like justice could be obtained by any application to that Court. There is no doubt, that an account may be had against a Corporation, subject to the qualification in the case of *The*

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(1) *The King v. The Whitstable Company*, 7 East, 353.

*Foundling Hospital* (1); and there is no distinction in principle between a foreigner, entering into a contract with a Corporation, and one of the corporators, having rights, adverse to them. This by-law is unjust, and partial; not being a general regulation, affecting the interests of all equally. Under this restraint a member could not let his boat for hire to The Sea-Salter Company; and in that respect the Law is in opposition to the general interest of trade.

[\* 322] \*The Lord CHANCELLOR [ELDON].—The Court must feel much reluctance in giving relief, such as is prayed by this Bill; but ought also to consider with attention the proposition, that under no circumstances can the jurisdiction attach upon this Company; which is carried in the argument to this extent; that a case, in which this Court would interfere, cannot be represented. I have mentioned one case, in which there is not the least doubt, that this Court would interfere: perhaps others might be suggested; and I may state, that there is not an instance of a by-law like this; restraining the individual members of the Corporation from being concerned, either in any other place, or within given limits, in the same trade. These by-laws go much farther. It has been observed correctly, that my determination must be upon what appears upon the Record, not upon an hypothetical case. This Company, acting as a Corporation before the year 1793, were then incorporated. Upon looking into the books cases are found to establish, that, where there is a custom to make by-laws, even in restraint of trade to a certain extent, which would not have been good under the authority of charter, that may be good by custom. The case is therefore to be considered in this point of view; that this might by possibility have been a Corporation by prescription, entitled by custom, if not authorised by Charter, to make by-laws; and it is too much for me to say, whether this by-law is good, or bad. I am satisfied, that at least the

reasoning, with regard to what individuals may do by contract as to particular trades, will apply to the \* point whether this is a good by-law; as it has been frequently determined, that what may very well be made the subject of contract between the different interests in a partnership would not be good as a by-law; for instance, an agreement among the citizens of London, who have as extensive a power of making by-laws as any Corporation, that they would not sell, except in the markets of London, would be good: yet it has been declared by the Legislature, that a by-law to that effect is bad. This case therefore must be put in some shape for the opinion of a Court of Law; and an action, for the purpose of trying the validity of the by-law, seems preferable to a case; which would not comprehend that point upon the distinction between charter and contract with reference to by-laws.

The next consideration is, whether this Court has any jurisdiction; taking the Plaintiff to be a member of this Company, excluded from

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(1) *The Attorney General v. The Governors of the Foundling Hospital*, ante, vol. ii. 42.

a share of the profits ; divisible as profits in the singular, but immemorial, mode of dividing the profits of this concern ; that he is excluded, as being a person, not entitled to be summoned, according to the answer, to do the dredge-work : not disfranchised ; or deprived of his corporate rights ; or suspended from that character : therefore not placed in a situation to apply for a *mandamus* ; either as being actually disfranchised ; or as suspended merely : if in that case a *mandamus* would lie ; as to which point the authorities are both ways ; though I do not see, why it should not lie : suspension being disfranchise<sup>m</sup>ent *pro tempore*. In this case however the whole corporate character is in fact left in him ; but all the beneficial interest is taken out of him for a time ; and the question is, whether it is unlawfully taken out of him : and, if so, whether there is a remedy at law.

\* It is contended, that, if that is so, there is no remedy [\* 324] in Equity : first ; as the Bill is against a Corporation : secondly, as it is against a Corporation of so singular a nature, with reference to the property, out of which the profits are to arise, that the Court cannot execute its Decree. With regard to the former objection, that the Defendants are a Corporation, if it is true, that the case may exist of a Corporation, not subject to any remedy, at Law or in Equity for the most apparent wrong, there is a strong call upon the Legislature to stay their hand in forming these Corporations. We find from the experience of every day, that, as individuals cannot possibly hold out responsibility to the extent, required in great concerns, therefore great trading Companies are formed : the property of the Company yielding a profit ; which according to the nature and principle of the undertaking is to be divided among the individuals, composing that Corporation, just as if they were not incorporated. There is no mode of ascertaining what is due, except an account in a Court of Equity : but it is said the party may have a discovery ; and then go to Law. The answer to that is, that the right to the discovery carries along with it the right to relief in Equity.

The next objection is, how can the Decree be executed against this Company ; and I admit, there is great difficulty in that. The course against a Corporation is by sequestration, or *distringas*. I do not conceive it to be impossible to lay hold of their property, and with regard to the power of the Court there is no distinction, whether the subject is a fishery, or an inheritance of another nature. The Court must deal with it, as well as they can ; to prevent a failure of justice altogether ; and, if by resisting the demands of justice they expose their property to ruin, the mischievous consequences must be attributed to themselves. In the case of a Glass Company at Liverpool, \* under a contract to divide the profits, [\* 325] the manager refusing to give any account to a party, entitled to participate, can a doubt exist, that this Court would direct an account ? The effect might be, that the Court would be under the necessity of carrying on the glass-work ; yet that difficulty would

not prevent the Decree ; though it might induce the Court to modify it : so as to do as little injury as possible (1). The difficulty applies equally to a suit by a third person ; for instance, for articles, supplied to this Corporation ; can there be a doubt, that he would be entitled to an account of the oysters, sold at Billingsgate ? If a Decree is due to a member of the Corporation, there can be no more difficulty in executing a Decree for him than for a stranger ; and a stranger must clearly have a Decree, if due to him ; and be entitled to enforce it ; though the property is of so peculiar a nature.

Still, I admit, a Court of Equity ought to interfere with great reluctance, where the Plaintiff can have a complete remedy at Law. Supposing therefore the account to be sought against a party, properly accountable, and such as can be given by a Decree, aiming at all the justice, which the case in Equity admits of, the previous consideration is, whether relief can be obtained at Law to such an extent, that this Court ought not to interfere ; and what are the remedies at Law. We know the reasons, upon which the application, that was made to a Court of Law, failed (2). Lord Ellenborough's opinion seems to be, that, as this Corporator was neither disfranchised nor suspended, but was merely under an interdiction from receiving profits, he might, if legally entitled to them, have an action against those, who disturbed him in the perception of them ; [\* 326] and \* if he had any right to a *Mandamus*, it would be for the share of the profits, withheld. Mr Justice Lawrence says, admitting, that an action would not lie, as it was the case of a partnership, and no admitted balance, he might go into Equity ; and there is great difficulty in any other way of putting the case.

It occurred to me, that perhaps a *Mandamus* would lie to compel them to assign to him his stint : but it is clear, that such a *Mandamus* would not give him all the remedies, to which he is entitled. If he is entitled to relief in Equity, they cannot insist, that he was not entitled to be summoned : an objection, that is waived by the Answer : nor can they be heard to say, in opposition to the language of all their Orders and Decrees, that there are no profits ; which are ascertained, and divided, in a very singular mode. I cannot conceive, how the Court of King's Bench can by *Mandamus* tell him, what is the amount of profit after paying the dredging work and other charges.

It is said, an action might be brought against the foreman ; who might be considered as liable to pay that share of the profits, to which the Plaintiff would be entitled ; who would therefore in that action recover the whole. Lord Ellenborough however seems to carry that no farther than the six shillings. The argument must be pushed to this extent : that the Plaintiff, though not summoned to do the dredging work, yet, being entitled to be summoned, is to be paid according to that right. How can the Court of King's Bench

(1) See, ante, the case of *The Opera House, Waters v. Taylor*, vol. xv. 10, 14 ; *Turner v. Morgan*, viii. 143, the case of partition of a house.

(2) *The King v. The Whitstable Company*, 7 East, 353.

in that way state; what he is entitled to? They must take either such sum as a certain member receives, or some other proportion; and the former is open to this fatal objection: that in the calculation, upon which that person is to have that sum, the Plaintiff is excluded from any share; and therefore it must be shown, what every individual would be entitled to \*receive upon a different [\* 327] calculation. Upon the whole there is no complete remedy at Law in that way; as at Law the proportion he was to have cannot be ascertained.

I cannot therefore see, with this by-law; assuming it not to be legal, how the Plaintiff can obtain relief, except in Equity. The answer to the objection, that he is to raise this demand, not against the Corporation, who are not accountable, but against the foreman, or some other officer, who pays, is, that it is the Act of the Corporation, that prevents his receiving. The foreman is the agent of the Corporation: the payment is demanded from them: and while the foreman withholds it under a by-law, not declared illegal, an action could not be maintained against him: nor is he liable to an account.

Another objection, that the profits are gone, having been actually distributed, has no force. Supposing this Company not to be a Corporation, there would be no difficulty. This Court would in the case of a mere trading Company give relief, as beneficial as under the actual circumstances could be given. Upon a Bill for an account, running through a vast series of years, open to all the objections and difficulty, arising from the length of time, the Court, feeling the injustice of giving the account, as it would be given, if sought in a reasonable time, compelling the Defendant to ransack his papers, and produce vouchers for every item, but considering it not unreasonable, that the Plaintiff should have an account, would give that relief; with a modification calculated to do the best justice, that the circumstances admit; giving the necessary directions for that purpose, that for certain items vouchers shall not be required, &c. So, if this was a mere trading Company, there would be no difficulty upon the particular circumstances of the case; the Court \* would [\* 328] not, contrary to the usage, disturb the application of that surplus, which was never considered divisible; and take away the power of using it as the means of carrying on the concern; but, ascertaining by account what was due to the Plaintiff, would take care, that out of any future sums, forming dividend, a proportion should be taken, before it should be divided according to the ancient mode, sufficient to pay to the Plaintiff what he ought to have received; and that the remainder only should be divided.

Upon these grounds, unless I can be satisfied, that the party has such a remedy at Law as ought to bar his application to a Court of Equity, I conceive he has a right to apply here for such relief, as under all the circumstances he is entitled to; provided these by-laws are not valid; a question, which I am unwilling to prejudice by expressing any opinion upon it: but, if a Court of Law will inform me, that this is not a good by-law, even in the state of this record, I shall

find the means of giving to the Plaintiff the benefit, resulting from his title in this concern, if not forfeited at Law under the by-law. The mode of trying that question appears to me to be an action; unless some more convenient course can be suggested. (1).

1. WHEN matters which, though cognisable at common law, involve a complicated account, are brought before a court of equity, there, if such court entertain the suit at all, it will not be disposed to do so merely by giving discovery, as ancillary to the decision of a common law tribunal, but will, itself, take the account, and make a final decree between the parties. Should any doubtful question of law arise, a case or issue may be directed (as was done in the principal case), in order to take the opinion of a court of common law upon that question; reserving to the court of equity, after it shall have received that opinion, the ultimate determination of the matters in question: see, *ante*; note 1 to *Weymouth v. Boyer*, 1 V. 417.

2. In the case of *The Attorney General v. The Corporation of Carmarthen*, Coop. 31, Lord Eldon observed, that, although Mr. Justice Ashhurst, in the case of *The King v. Watson*, 2 T. R., 200, 204, had intimated that the Court of Chancery had jurisdiction to restrain a corporate body from misapplying its funds, he (the Lord Chancellor) did not think the court could interfere with regard to the misapplications of the corporation's own money. His Lordship again had occasion to advert to the same question, in *The Mayor and Commonalty of Colchester v. Lowten*, 1 Ves. & Bea. 245, and, in that case, decided, that, where a corporation holds property for corporate purposes merely, the court ought not to be called upon to interfere with respect to the application of such property, as it properly might, if the property were held for charitable purposes. Where corporators are trustees for a charity, there can be no doubt of the right of a court of equity to see to the execution of the trust: see the notes to *The Attorney General v. The Governors of the Foundling Hospital*, 2 V. 42.

3. The first process against a corporation, when such a body is in contempt, is by *distringas*; and, upon the return of a single *distringas*, an order nisi may be obtained, by motion of course, for a sequestration; which order, unless good cause is shown to the contrary, will, in due course, be made absolute: *Lowten v. The Mayor of Colchester*, 3 Meriv. 545. With respect to the proceedings of sequestrators, and the different mode in which the sequestered property must be dealt with, when the sequestration is on *meane* process, from that which would be proper when the object is to enforce a decree for payment of money, see the notes to *Hales v. Shafloe*, 1 V. 86.

4. The difficulties which a suit involves form no conclusive objection to its being entertained by a court of equity; the court will endeavor to deal with the difficulties, and to do justice as far as possible: see note 4 to *Randall v. Willis*, 5 V. 266.

5. The proceedings in this cause, when, after the trial at law, it was again brought on for farther directions, are also reported in 1 Meriv. 107-113; the proceedings at common law are reported in 2 Mau. & Sel. 53.

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(1) See the conclusion of this cause, *post*, vol. xix. 304; 1 Mer. 107.

## COX v. PAXTON.

[1810, Nov. 14.]

BILL, following life insurances, effected by the Plaintiff's clerk with the Plaintiff's money, procured by embezzlement, and transferred to the Defendants for valuable consideration but with notice.

Demurrer allowed: the transaction amounting to felony by the St. 39 Geo. III. c. 85; and therefore not raising a civil contract (a): secondly, the policies not being the Plaintiff's property.

THE object of the Bill was to obtain the delivery of certain Policies of Life Insurance; as having been effected by a clerk of the Plaintiffs with their money, which he had embezzled by means of false entries in the accounts of his receipts and payments; charging, that they were received by the Defendants on account of a debt, due by him to them, with notice.

To this Bill the Defendants demurred.

Mr. *Leach* and Mr. *Abercromby*, in support of the Demurrer.—The objections to this Bill are, first, that the transactions stated, creating, as between the Plaintiffs and their servant, a case of felony, cannot be the foundation of a civil demand: secondly, if they do not amount to felony, the money, under this application of it constituting a direct breach of trust, cannot be followed.

First, this embezzlement by a clerk, applying to his own use the excess of his receipts beyond his payments, and with that view making false entries, amounts clearly to felony, under the Act of Parliament (1), relative to bankers' clerks: and the consequence is, that no civil demand can arise out of that transaction.

Secondly, taking the act of the clerk to create, not a felony, but a mere debt, the application of the money to a particular purpose of his own was a direct breach of trust. Is there a general rule of Equity, that in such a case \*the *Cestui que trust* can follow that money, perhaps lent upon bond, as the specific [\* 330] trust money; claiming, if the trustees should fail, or die insolvent, a lien against his general creditors; though the Act was a direct breach of his duty, as trustee? That is not according to the principles of a Court of Equity. The authorities most applicable are those upon trusts to lay out money in land. The general rule is, that, if a trustee for the purchase of land, to be settled to particular uses, makes a purchase, but does not settle, that purchase shall, unless the contrary intention appears, be considered as made in execution of the trust; and the *Cestui que trust* shall have the benefit of it without any declaration: but if the trustee appears not to have intended to execute his trust, making the purchase altogether with a different view, the claim of the *Cestui que trust* cannot be supported. In the case of *Perry v. Phelps* (2) that distinction is

(a) See, *ante*, note (a) *Claridge v. Hoare*, 14 V. 58.

(1) Stat. 39 Geo. III. c. 85.

(2) *Ante*, 173; vol. iv. 108.

clearly established; and the decision was against the trust under circumstances much more favorable to it; the act of the trustee being equivocal, not, as in this instance, a clear, direct breach of trust.

Mr. *Richards*, and Mr. *William Agar*, for the Plaintiffs.—The Defendants hold these Policies of Insurance by delivery of the clerk; with knowledge, that they were the produce of the Plaintiffs' property; contending, that they are entitled to hold them for the right owners, as receiving them from a person, guilty of a felony, or having committed a breach of trust. In *Perry v. Phelps* it appeared clearly, that the trustee laid out scarcely any part of the trust-money: the Master's Report ascertaining, that the rents received formed a very small proportion of the money, laid out in the purchase; all the rest being his own property.

[\*331] \* Mr. *Leach*, in reply.—If the act of the clerk is tainted by felony, the Plaintiffs could have no lien upon the produce; and as little from this transfer to third persons. The only effect of notice in equity is to place the assignee in the situation of the assignor.

The Lord CHANCELLOR [ELDON].—This appears to me to be a felony; no case affording more clear evidence for a conviction under this Act of Parliament could be brought forward than that of a receiving clerk, entering some receipts, and omitting others. That has been decided at the Old Bailey to be felony. Taking that to be clear, you could maintain no action for this money: a principle of policy interfering; nor could you compel an account here for the same reason. You cannot denominate him a trustee in any way. There was no trust to lay out this money upon Policies of Insurance: nor any obligation except to account. His application of the money in this way could never, even without this Act of Parliament, have given the Plaintiffs a title to these Policies of Insurance. How then are they to be considered the Plaintiffs' property in the hands of the Defendants? At the utmost it could not go beyond the amount of the embezzlement. If this case is to be taken according to the representation of the bill, (as it must be upon this demurrer, but only for the purpose of the argument) that the Defendants, knowing, that the Plaintiffs' money was laid out in these policies, insist upon holding them, the morality of it is obvious: but that cannot be the foundation of a rule in Equity. Those who obtained this Act of Parliament, making the embezzlement of their clerks felony, are much surprised at the consequence; that they cannot recover their money.

The Demurrer was allowed.

See note 1 to *Claridge v. Hoare*, 14 V. 59.

JONES, *Ex parte* (1).

[1810, Nov. 14.]

**REASONABLE** commission 2*s.* 6*d.* per cent., allowed to a country banker on discounts; though for a person resident in London, and paid through a banker there; if not colorable.

THE Petition stated, that the petitioners, bankers at Faversham, had for many years in the usual course of their business discounted bills for John Ellil, the bankrupt; who resided and carried on business in London; and that on the 22d of May, 1809, they discounted upon his application a bill for 64*l.* 16*s.* 6*d.* at six months, drawn by him upon, and accepted by, persons in London; and on the 26th of June, 1809, they discounted another bill for 84*l.* 3*s.* 8*d.*, also at six months. These two bills were discounted by the Petitioners in the usual course of their business, and according to the usage of country bankers; charging interest at 5*l.* per cent. and commission at the rate of 2*s.* 6*d.* per cent. per month for the time the bills had to run; which is a reasonable commission, and according to the usage of country bankers in respect of the expense of remitting checks, establishing a credit with bankers in London, having always an unproductive balance there, and keeping a clerk. The money was paid at a banker's in London.

The Petition prayed, that the petitioners may be at liberty to prove the amount of these bills under the Commission.

Mr. Trower, in support of the Commission.

Mr. Cooke, for the assignees, admitting, that the allowance of Commission is not unreasonable in the general case of discounts, afforded by bankers in the country, took the distinction, that in this case, the payment not being in the country, there was nothing to be done, except merely writing to the banker in London; where the money was required to be paid.

\* The Lord CHANCELLOR [ELDON].—I remember the [\*333] time, when this allowance of commission to country bankers was very much doubted. The first case upon it was before Baron Eyre: but it has been long settled, that a country banker may take a reasonable commission for discounting (2). Admitting that to be so, if both the parties lived at Faversham, it is said, where a person, residing in London, gets his bills discounted at Faversham, the commission cannot be taken for providing the funds for putting the money into the hands of the party in London. If it can be established, that the bills were sent into the country as a color and device, it would, I admit, be usurious: but if the transaction is no more than this, that a person, not having sufficient credit in London to enable him to get his bills discounted there, applies to country bankers for that

(1) 1 Rose's Bankrupt Cases, 29.

(2) See *Auriol v. Thomas*, 2 Term Rep. 52; *ante, Baynes v. Fry*, vol. xv. 120, and the note, 121.

purpose, desiring to have the money paid in London, they must provide the funds for that purpose; and, the same charges being incurred, there is the same consideration in the one case as the other. If therefore the case is no more than that, I think these bills may be proved.

The Order was made.

1. This case is also reported in 1 Rose, 29.

2. As to the allowance of reasonable commission, in addition to legal interest, to country bankers who discount bills on London, see, *ante*, the note to *Baynes v. Fry*, 15 V. 120.

[\* 334]

### LOBBON, *Ex parte.*

[1810, MARCH 29.]

BILL, after proof under a Commission against the acceptor, was paid by the drawer; who, after a Dividend having arrested the bankrupt for the balance, and, being also a surety for him on another Bill, was ordered to discharge him, and restrained from lodging any detainer, under the Stat. 49 Geo. III. c. 121, s. 8 and 14.

A COMMISSION OF BANKRUPTCY issued against the Petitioner in April 1809, under which a bill of exchange, accepted by him, was proved by an indorsee; who afterwards received the amount from the drawer; who, after a dividend of three shillings in the pound, in January, 1810, arrested the bankrupt for the balance. The bankrupt who had not obtained his certificate, was also liable to the same person as surety, upon another bill, which had not been, though it might have been, proved under the Commission. The Petition prayed, that the Petitioner may be discharged out of custody at the suit of the drawer; and that he might be restrained from proceeding at law against the bankrupt upon the other bill; with an affidavit, that the assignees held funds sufficient, without disturbing the dividend made.

Sir *Samuel Romilly* and Mr. *Cooke*, in support of the Petition, contended, that the Bankrupt was clearly entitled to his discharge, and to be protected from a detainer, within the late Act of Parliament (1).

Mr. *Hart*, for the creditor, insisted, that the Act of Parliament contemplated sureties in the strict sense; that this person was not a creditor, when the Commission issued; but became so by a new distinct demand, arising out of the subsequent payment.

Sir *Samuel Romilly*, in reply, observed, that the intention of the

(1) Statute 49 Geo. III. c. 121, s. 8 and 14; repealed and re-enacted by the Statute 6 Geo. IV. c. 16, s. 1, 52. See *Ex parte Lloyd*, *ante*, 245, and the references in the note.

Act was clear to comprehend this sort of case; and the description is, not only "a surety" but any person, who shall be "liable for" any debt of the bankrupt.

\* The Lord CHANCELLOR [ELDON].—This case appears [\* 335] to me to fall within the two clauses of the Statute, the eighth and the fourteenth. This creditor was liable for a debt of the bankrupt; and I know, these words "or be liable for" were added for the very purpose of embracing this sort of case. It is impossible to represent, that this was not a debt of the bankrupt's; though *solvendum in futuro*. This creditor, being liable for that debt, must take the benefit of the proof made by the holder of the bill; and consequently cannot hold the arrest.

The Order was made according to the Prayer, that the Plaintiff in the action should discharge the Petitioner; and should be restrained from lodging any detainer against him.

1. This case is also reported in 1 Rose, 219.
2. After a person, liable for the debt of a bankrupt, has discharged the demand, he may prove under the commission, if the original creditors have not done so; or, if they have, he will be entitled to the benefit of the proof made by them; see, ante, note 2 to *Ex parte Matthews*, 6 V. 285.

### CRUTTWELL v. LYKE (1).

[1810, Nov. 20, 21.]

Sale of a trade with the Good-will does not prevent the Vendor's setting up again a similar trade without express covenant; or fraud, by representing it as a continuation of the old trade, or by conduct encouraging others to involve themselves, in the confidence that he would not trade again; &c. (a).

Sale under a Commission of Bankruptcy of the Wagon Trade from Bristol and Bath to London with the Good-will. Another concern from Bristol and Bath to Warminster and Salisbury being purchased in trust for the bankrupt, having obtained his Certificate, he commenced trade again to London by that road; soliciting customers by advertisement, and cards, stating generally that being reinstated by his friends in the Carrying business his wagons set out at the usual hours, &c. An Injunction was refused.

Distinction between the right to publish a similar work, or set up a similar trade, and the fraud of identifying it with the work or trade of another. Injunction in the latter case, [p. 342.]

Compensation under the London Docks Act to the proprietors of ancient privileged quays passed under a Commission of Bankruptcy, [p. 343.]

In the year 1804 George Lye, being at that time engaged in the carrying trade by wagons from Bristol through Bath and

\* Warminster to Salisbury, purchased from the executor of [\* 336]

(1) 1 Rose, Bank. Cas. 123.

(a) What is the "good will of a trade," and as to contracts in restraint of trade, see, ante, notes (a) and (b) *Shackle v. Baker*, 14 V. 468.

Wiltshire his carrying trade by wagons from Bristol through Bath to London; with the premises, engaged in that business; consisting of a warehouse in Peter street, Bristol, and extensive warehouses in Bath. He afterwards took his son Edward Lye into partnership with him; and they continued to carry on both those concerns, until a Commission of Bankruptcy issued against them; having extended the Warminster and Salisbury concern by setting up a wagon from Salisbury to London.

The assignees under the Commission put up to sale by auction the whole of this carrying business in different lots; the particular describing Lot 1, as the carrying business of George and Edward Lye; together with the good-will of the extensive premises in Broad Street, Bath, used for many years in the business of a common carrier from Bath to London, &c.; also the premises in Peter street, Bristol, together with the good-will of the long-established trade, &c.: Lot 2 was described, generally, as the interest of the bankrupts in the carrying trade from Bristol to Warminster and Salisbury: stating that the purchaser was to take the stock upon the respective premises; and specifying some particulars, as to the hours, at which the wagon would be at the respective places, &c. The first lot was purchased by the Plaintiff for 4000*l.* The second lot was purchased by the nephew of one of the assignees; and after Edward Lye had obtained his certificate, he was again put into business in that concern; on which occasion he stated both by advertisement, and by hand-bills distributed, that being reinstated by his friends in the carrying business, he informs the public, that his wagons set out at the usual hours; describing the course, not by the direct road to [ \* 337 ] London, but by the road through \* Warminster and Salisbury. It was stated by affidavit, that one of the assignees, an uncle of the bankrupt, assisted him by the use of his books in soliciting the customers.

Under these circumstances the Plaintiff moved for an Injunction.

Sir *Samuel Romilly* and Mr. *Heald*, in support of the Motion.—The right of the bankrupt to set up, and carry on, again, the same trade, and in the same place, is not disputed: but the objection, that will maintain an injunction, is, that after this trade has been sold, as the good will of the old established trade, he has set up the same trade; represented as the continuation of that trade, and soliciting the customers of that ancient establishment. In that view of the case therefore the question is, not, whether the Defendant has a right to prosecute the business of a carrier from Bristol to London, but whether he can represent himself as continuing the same trade, which had been sold, with the good will: attached, not to the premises, but to the name: and is justified in soliciting the customers not to deal with the person, to whom that sale was made. That this is not the trade of a carrier, generally, or to Warminster, but to London, is evident from the advertisement; representing the bankrupt as being reinstated by his friends in the carrying business; enumerating all the particulars of that trade, which he had carried on before the

bankruptcy, and which must be understood as that, in which he was reinstated, with the direct carriage from all the places mentioned ; including Bristol and Bath as well as Warminster and Salisbury, to London ; the wagons stated as going out at the usual hours : an express reference to the former trade. The result is, that this is a trade, \* set up in direct opposition to the old trade, [\* 338] which the Plaintiff purchased ; and in violation of good faith with him, by the assistance of one of the assignees, affording facilities from the books, the bankrupt is endeavoring to attract the customers from that concern to the rival trade so revived by him. That conduct falls directly within the principle of *Hogg v. Kirby* (1) ; and is the proper object of restraint by Injunction, without interfering in any degree with the personal right of a bankrupt to set up trade again.

There are two other cases, supporting the principle, upon which this Injunction is sought. In *Keene v. Harris* the printer of a newspaper, the Bath Chronicle, bequeathed to his widow the benefit of that trade, subject to the trust of maintaining and educating her family. Having formed an attachment for the person, who had been employed as foreman in conducting that business, she assisted him in setting up the same paper ; giving him the use of the letter-press, &c. on the premises. A Bill was filed by the executors ; and an Injunction was granted.

In *Chandler v. Gardner*, upon the establishment of the West India Docks, compensation was given by the Legislature to the proprietors of three ancient privileged and free quays on account of the exclusive trade they had enjoyed ; and upon the bankruptcy of one of those persons the question arose, whether the bankrupt or his assignees were entitled to that compensation ; whether it followed the property, or the person ; and it was held, that it followed the property ; and passed to his assignees.

Sir Arthur Piggott, and Mr. Leach, for the Bankrupt : Mr. Richards, for the Assignees.

\* This is an attempt to interfere with a personal right of [\* 339] the bankrupt ; of which he cannot be deprived by the assignees, or any other person : a right, which not being forfeited by the bankruptcy, could not be disposed of ; and cannot be affected by any fraudulent or improper conduct of the assignees ; which might release the party, with whom they contracted ; and to whom they are responsible. The advertisement is expressed in the usual terms upon the sale of any premises, where a particular business was carried on ; and has nothing peculiar. This jurisdiction, dealing with the contracts of the assignees according to their expression, or their necessary implication, touches no personal right of the bankrupt ; who was no party to the contract. The proposition is, that the assignees of a bankrupt have the power by their contract to limit his future means of existence ; to regulate his future life ; and to

determine, that he shall not in any subsequent period establish the same trade in the same place ; in effect establishing against him a monopoly of this carrying trade from Bath to London ; preventing him from ever setting up the same trade between the same limits. In support of that proposition the term "good-will" is misinterpreted. The person, succeeding to the possession of particular premises, forming the site of a particular trade, attracted by habit and local circumstances, succeeds to a considerable advantage, derived from the habits of those, who deal there ; and who upon the same ground of local convenience are likely to continue. Good-will therefore in that sense may be described as the advantage, belonging to a house, long accustomed to carry on a particular trade. In the common case of a lease, assigned without covenants against carrying on the trade, and to recommend the customers, &c. there is nothing to prevent the assignor commencing that trade in the immediate neighborhood the next day ; but the vendor may [<sup>\* 340]</sup> engage to give as against him a monopoly \* to the vendee, by a covenant not to carry on the same trade within a limited distance ; and farther to recommend the customers ; and that contract would bind the individual contractors. In the instance of trustees for the benefit of creditors, or assignees under a Commission of bankruptcy, the question is the same : the effect depending upon the extent of their authority ; whether restrained to a mere assignment of the property ; or extending to a personal contract for farther advantages. Can a power, thus deeply affecting the rights and interests of the bankrupt, depend upon the accidental length of the term ; which is in this instance twenty years ; in another may be only a few days : or nothing ; the bankruptcy perhaps determining the lease ? The conclusion from all this is, that the subject of sale under this description of good-will is merely the advantage, attached to the premises, as having been long the site of a particular trade ; and following that trade into whosoever hands it may come. Then, with reference to the special circumstances of this case, the assignees have not affected to sell more by the terms of this particular ; which gives a plain description, corresponding with the ordinary power of assignees to sell. They could not bind the bankrupt to serve the purchaser in this trade for a term of years upon the principle, that it would be beneficial to his estate. These are two distinct trades ; and, though the representation in the particular for sale is, that Lye had been engaged in the ancient concern from Bath direct to London, when he speaks of being reinstated in the carrying business, he must be understood as alluding to the Warminster concern alone ; which was the subject of the purchase in Lot 2.

The case of *Keene v. Harris* was clear : first, supposing the Defendant to have been a mere stranger, holding out his paper to the public as the ancient paper, it was \* in the nature of a piracy : Secondly, as he was affected by the breach of trust, committed by the widow ; who, being a trustee for

her children, was carrying on a rival trade to their prejudice. In *Chandler v. Gardiner* there was no doubt, that the compensation followed the property under an assignment by operation of law; as it would under an assignment by deed without a particular reservation. In either case the assignees, representing the property, were entitled to that compensation, attached to it.

The Lord CHANCELLOR [ELDON].—This motion is novel in its circumstances, if not in principle; and is of very great importance. I therefore did not grant the Injunction immediately; but desired to hear it discussed at the Bar; as on the one hand, if this Court does not interpose, the Plaintiff cannot possibly have what he really intended to purchase: on the other, if the Defendant has a right to carry on this trade, I should by interfering destroy that right to an extent, which I could never remedy. It struck me, that the Plaintiff's right must be founded either in the covenant (1) of the bankrupt; or in considerations, arising out of his conduct; or in the fact, that he is not carrying on that trade, which he purchased, or which, independent of purchase, he has a right to carry on; but under that color is carrying on the trade purchased by the Plaintiff (2). I do not enter into the question as to the effect of a covenant by a bankrupt, whose property has been sold by his assignees with the good-will, never to engage again in such a trade. The circumstances do not lead to that; as here is no such covenant. With regard to conduct a man might stand by; and give encouragement, generating a confidence that he would not engage in such a trade; inducing other persons to involve themselves; on the \*ground of which conduct this Court might interpose: [\*342] but it does not appear to me, that either by the effect of the contract, attending to the description of the subject, comprised in Lot 2, or by any circumstances connected with it, the purchaser would have been, or the bankrupt now is, precluded from carrying on the trade he is now engaged in. I lay entirely out of the case the fact, that, while the bankrupts were carrying on both the original Warminster concern and Wiltshire's, they started a wagon from Salisbury to London; the description of Lot 2, representing it as a concern from Bristol to Warminster and Salisbury: as distinct therefore from the other concern as before the purchase by Lye.

The question then is, whether upon a fair understanding, or representation, agreeable to the fact, this person is carrying on the Plaintiff's trade; and in this view of the case I refer to *Hogg v. Kirby* (3); where the Defendant had a clear right to publish a similar work, under the same title as the Plaintiff's, represented as distinct and original: but was prevented from publishing his book as the work of the Plaintiff; which had been partly published: the Injunction not going farther than to restrain the publication as the

(1) *Ante, Barret v. Blagrave*, vol. v. 555; vi. 104; *Bozon v. Farlow*, 1 Mer. 459.

(2) *Ante, Shackle v. Baker*, vol. xiv. 468; *Harrison v. Gardner*, 2 Madd. 198; *Williams v. Williams*, 2 Swanst. 253; *Bryson v. Whitehead*, 1 Sim. & Stu. 74.

(3) *Ante*, vol. viii. 215. See the note, v. 26.

same with, or a continuation of, the Plaintiff's work. So there can be no doubt, that this Court would interpose against that sort of fraud, which has been attempted by setting up the same trade, in the same place, under the same sign, or name; the party giving himself out as the same person.

The case of *Keene v. Harris* has not much relation to this subject.

The Defendant, engaged as foreman by the widow, who [\* 343] had conceived an attachment to him, \* partly in the very house, and with the types, of the old concern, published a paper of the same name as that, which she had been in the habit of publishing, as trustee; the Bath Chronicle. That was a gross breach of trust; of which the Defendant could not take the benefit.

Another case, to which this is compared, *Chandler v. Gardiner*, bears little upon it. The Legislature destroyed beneficial interests, which individuals had in the concerns and habits of their lives; giving them a compensation for interests of that substantial; though not very tangible, nature; something like good will. I conceived, that the question was only, whether that was an interest, capable of disposition; and decided, with great reluctance, that, as it was an interest in the bankrupt, comprehended in the terms of the Bankrupt Acts, it was capable of being disposed of; and belonged to his assignees.

This Defendant cannot carry on the trade from Bristol to London, holding himself out as carrying on the trade, which the purchaser of Lot 1 bought; and there is no doubt, that he gave a very considerable part of his purchase-money for the good will. This leads to a consideration of the facts, under which this Injunction is sought. The advertisement, published by the bankrupt, having obtained his certificate, has very incautious expressions; if he meant to hold out merely, that he was about to set up again in business; as there is no doubt he was entitled to do; and to give the public that general information: whatever may be said of particular applications to customers. The expression, "being reinstated by his friends in the carrying business" will bear either sense: the old, or the new, trade: but the information, to the public, that his wagons set out at the usual hours, not being more clearly pointed to the Warminster trade, must be referred to the old concern. I do not

understand, as it has been argued, that, having relation to [\* 344] \* some trade between Bristol and London, it means the direct trade to London: but, if required, I will put him to explain that upon his oath. The description of his course appears to me in some degree connected with the intention of taking in goods from Portsmouth, the Isle of Wight, Southampton, &c.; and, if that was the object, this contract of sale raises no ground against his carrying it on. The utmost extent would be, that he should not travel the road from Bristol to London, which the old concern used; and whether that could be maintained is a more difficult question. By travelling only a part of the way between Bristol and London he does some injury to the old concern; and

completing the course is only prejudicial in a greater degree. If he is really carrying on his own trade, and not the Plaintiff's, through this course, it would be too much to put an end to it: but, if under the color of chalking out a different course of trading he is really carrying on for his own benefit the trade of others, that will give a ground for Injunction; and unless the affidavits can displace the Defendant's representation, I cannot think there is a ground.

1810, Nov. 21st. The Lord CHANCELLOR [ELDON].—I take this to be the short result of the facts of this case. Excluding what passed between the year 1804 and the sale, the Warminster concern was originally distinct: and the representation as to Lot 2 gives no notice, that the purchaser of that lot would have any concern with any wagon transactions, connected with London. I take it also to be clear, that Lye, one of the bankrupts, having purchased Lot 2, did set up the wagon trade from Bristol through Bath, and by a different line of road to London: in a sense the same trade as that wagon trade, purchased by the Plaintiff; that direct \*solicitation was addressed by Lye to the public; inviting [\*345] their custom in the trade between Bristol, Bath, and London; according to the true interpretation, by a different line of road; and that solicitation was made, not merely by advertisement, but by cards handed about. There is farther upon the affidavits so much probability of direct solicitation to the customers of the old concern in some few instances, that the fact may be fairly assumed; and under these circumstances the question is, whether the injunction can be maintained against the bankrupt, carrying on this trade between Bristol, Bath, and London; as he does carry it on: or more broadly, whether, if he carried it on in a more direct course than appears upon these affidavits, the Injunction would be justified.

Attending to the fact, that carrying on the trade from Bristol to London, though by a different course, the bankrupt must convey goods, which, if he was not engaged in that trade, would be conveyed by the Plaintiff, it is also extremely clear, that there may be a great proportion of business between those *Termini*, in which the Plaintiff really would have no concern; and one of the difficulties, that have pressed me throughout this case, is, to what extent upon the principle this Injunction is to go; as there is no doubt, that the Defendant, by taking goods from Bristol to Hounslow, where the roads meet, would to a certain extent prejudice the Plaintiff; and so every removal from Bristol towards London would be an injury to him in a greater, or less, degree.

It is necessary first to consider, whether the sale under the bankruptcy of Lot 1, and the good-will, belonging to those premises, or the trade established upon them, would, if there was nothing more, upon any principle prevent the bankrupt's immediately, by the assistance of \*his friends, again setting up the trade [\*346] from Bristol to London by the very same road: and I cannot say, that any of those interests, which a bankrupt is supposed to have by the effect of the certificate, or in the surplus of his estate,

after payment of his debts, form a principle, upon which he should not be permitted to engage again in the like trade ; which in this sort of case is materially distinguished from the same trade. In *Hogg v. Kirby* (1) the Defendant's magazine, being published as a continuation of the Plaintiff's, was the same. Supposing the bankrupt therefore not to have had any other interest, there is no principle, upon which this Court could hold, that he should not engage in the direct trade by the same road.

The bankrupt however happens to become the purchaser at the same sale of the Warminster interest ; and the farther question is, whether that fact affords a principle, not arising out of any engagement, expressed as between the vendor and vendee of Lot 1, or any description of Lot 2, of which the bankrupt was the purchaser, upon which it cannot be maintained, that, being at liberty to use the Warminster trade, he shall not be at liberty to become a trader in the like trade from Bath to London ; and the converse must hold ; that the Plaintiff also by a similar equity cannot convey any thing from Bristol through Bath and Warminster to Salisbury. That is a grant deal too much to be inferred from any thing, that has passed. The good-will, which has been the subject of sale, is nothing more than the probability, that the old customers will resort to the old place. Fraud would form a different consideration : but, if that effect is prevented by no other means than those, which belong to the fair course of improving a trade, in which it was lawful to engage, I should by interposing carry the effect of Injunction to a much greater length than any decision has authorised, or imagination ever suggested.

[\*347] What farther was done ? The bankrupt advertises that he is reinstated in the carrying business ; and, though that expression may have a tendency to misconception, yet he is in a fair sense reinstated, if, being at liberty, he has availed himself of that situation to set up again that carrying business. It amounts to no more than that he asserts a right to set up this trade ; and has set it up, as the like, but not the same, trade with that sold ; taking only those means, which he has a right to take, to improve it ; and there is no fact, amounting to fraud upon the contract, made with the Plaintiff. The question, whether under the circumstances the Plaintiff is to carry the agreement into execution, if the assignees have taken from him actively the benefit of that contract, is very different ; but, whatever opinion may be held upon this transaction in that view of it, I do not see the fraud, upon which, as a Judge in Equity, I can lay my hand ; and I dare not from this place so deal with it.

The Injunction was accordingly refused.

1. This case is also reported in 1 Rose, 123.

2. As to the general principles, established by adjudged cases, with respect to the sale of the good-will of a business ; and under what circumstances a court of equity will interfere to prevent infringements of such a contract : see, ante, the note to *Shackle v. Baker*, 14 V. 468.

## ROSE v. ROSE.

[ROLLS.—1810, Nov. 22.]

**CONSTRUCTION** of a Will; giving to the testator's daughter, by the description of heir under his Will, the legacy of a legatee, who died during the testator's life, by way of special substitution; not merely by lapse to her, as the residuary legatee.

By the Law of Scotland, as well as of England, a legacy lapses by the death of the legatee in the testator's life, [p. 351.]

FORRESTER ROSE, being domiciled in Scotland, by his Will, dated the 11th of April, 1799, declared, that he had resolved to dispose his whole estate, real and \* personal, to his only [ \* 348] lawful daughter, subject to his debts and deeds and to the legacies, after mentioned, as well as to any others he may hereafter legate; and that he thereby alienated and disposed, assigned, conveyed and made over, to and in favor of the said Mary Rose, his only child, and the heirs of her body, whom failing, to James Rose his brother-german, and to the children of the said James Rose procreated and to be procreated, existing at the time of the succession opening, and to Captain Bernard Rose, his natural son, all equally among them, share and share alike, the father only succeeding as a single individual equally and share and share alike with his own children and with the said Bernard Rose, all lands, heritages, &c. and in like manner all bonds, bills and documents of debt, stock in the government funds, household furniture, &c. and in general all and every sum and subject, of whatever nature, kind, or denomination, whether heritable or movable, and wherever situated, belonging to him at the time of his death; with and under the burden always of his debts, &c. and of the payment of 2000*l.* sterling to James Rose, in trust, for the use of his children: and declaring, that the sum of 2000*l.*, due to him by the said James Rose, shall both principal and interest be held to be discharged; and the principal thereof to remain with him in trust for the use of his said children: both those sums, making together 4000*l.*, to be equally divided among the said children: “the share of the deceased to fall and belong to my heir under this Will;” and with and under the burden of 2000*l.* to James Rose, 100*l.* to him in trust for his wife's use; and 1000*l.* to be paid to Bernard Rose, “whom failing, to revert and return to my heir under this Will.”

The testator then gave several legacies and annuities; and reciting, that he had by his contract of marriage assigned to trustees, as security for part of the \* jointure, 11,000*l.* [ \* 349] 3 per cent. stock, he desired, that in the event of his wife's surviving him without issue by their marriage at her decease the said 11,000*l.* 3 per cent stock “shall revert and return to my heir under this Will:” directing the whole aforesaid legacies to be payable at the first term of Whitsuntide or Martinmas after his decease; with

a penalty in case of failure ; and declaring his intention, that his said daughter should have the full sum of 10,000*l.* sterling free of every deduction or abatement whatever ; including the value of such heritages as shall belong to him at his death, estimated according to a Schedule. The Will then proceeded thus :

" The sum of 10,000*l.* I desire my daughter may have over and above and exclusive of her eventual chance of inheriting hereafter the before mentioned sum of 11,000*l.* 3 per cent. stock ; and therefore, that if my fortune shall fall short of a sum equal to the said sum of 10,000*l.* sterling over and above the before mentioned sum of 11,000*l.* 3 per cent. stock, and besides all the aforesaid legacies, that then and in that case, the aforesaid legacies shall suffer and sustain a proportional abatement and diminution ; so as never to affect or reduce the fortune of my said daughter below 10,000*l.* sterling ; but in case of the death of my said daughter without heirs of her own body, then any short-coming of my said fortune and estate shall not affect the foresaid legacies in any manner or way : but also declaring, that in case of any of the legatees predeceasing me, that his or her legacy shall fall, accrue and belong, to my heir before mentioned."

The testator afterwards declared, that in order to render this deed the more complete as to movables, he thereby appointed [\* 350] his said daughter and the other \*heirs in their order his sole and only executor and executors and universal legator or legataries ; and he appointed the Defendants, and the survivor, to be tutors and curators to his daughter.

By a codicil, dated the 17th of April, 1799, reciting the assignment of the 11,000*l.* stock by his marriage contract, as security for a jointure, and also an assignment by his wife's father of 2333*l.* 6*s.* 8*d.* 3 per cent. stock to the same trustees, as her portion, which latter sum was by the contract in the event of her surviving without issue to be considered as her sole property, and at her own disposal, and, should there be issue, both said sums at her death to devolve to, and be considered as the fortune of, such child or children, the testator directed in the event of his wife's surviving him with issue, and as a farther provision for them, that his heirs under the foregoing settlement upon the first term of Whitsuntide and Martinmas after his decease do make payment of 2000*l.* sterling to Mrs. Rose in trust for the use and benefit of such child or children ; and desired in this case, that the legacies in the foregoing settlement shall suffer and sustain a proportional abatement and diminution equal to the sum of 2000*l.* sterling ; but that the payment of this sum shall not effect or reduce the provision to his said daughter below the sum of 10,000*l.* sterling, as before mentioned.

The testator after making this Will and Codicil came to reside in England ; where he continued until his death, on the 20th of March, 1804 ; leaving a considerable personal estate in England and Scotland.

The Bill was filed by his infant daughter Mary Rose, by her next

friend, against the administrators with the Will annexed ; praying an account of the real and personal estates ; and the question arose upon the \* Plaintiff's claim to the legacy of 1000*l.* [\* 351] bequeathed to Bernard Rose ; who died in the testator's life ; as being in that event given by way of substitution to the Plaintiff by the description of "heir."

Sir Arthur Piggott and Mr. Wetherell, for the Defendants, contended, that, admitting the Plaintiff to be the person, intended by the description of "heir," this was no substitution of her in the place of the deceased legatee, but the common case of a lapsed legacy ; upon which presumption the Defendants had paid the other legatees 60*l.* per cent. on their respective legacies ; and that a sum should be set apart to answer the remainder of them in the event of the Plaintiff's death, without heirs of her own body.

1810, Nov. 22d. The MASTER OF THE ROLLS. [Sir WILLIAM GRANT].—It is agreed on both sides, and there is no doubt, that the testator's daughter is the person, who answers the description of "heir under this Will." The question is, whether the lapsed legacies go to her, as substituted in the place of the particular legatees ; or merely fall into the mass of that estate, of which she is the general or residuary legatee. In the latter case she will have no benefit but in the event of a surplus after satisfaction of the other legacies : in the other she will be upon the same footing as the other legatees : and entitled to such proportionable dividend, as the estate may afford after the preferable charges.

By the law of Scotland, as well as the law of England, a legacy lapses by the death of the legatee in the life of the testator. \* No special provision is necessary to give the heir [\* 352] under the Will, in other words the testator's daughter, whatever advantage may arise from the extinction of any demand upon the estate. The whole property is given to her, subject to the burthen of the particular legacies. A lapsed legacy ceases to be a burthen upon the property ; and it is unnecessary to declare, that the estate shall have the benefit of it. It is therefore argued, that the testator, directing the lapsed legacies to go to his daughter, must have intended something more than merely that they should fall into the mass of the personal estate ; and certainly there is no absolute repugnancy in giving a particular legacy to a residuary legatee. It is merely a question of intention. The words "revert and return" as to Bernard Rose's legacy at first sight do not convey the notion of a distinct and specific gift of the particular legacy ; but seem rather to refer to the general antecedent title, under which she would take every thing, not effectually disposed of : but no great stress can be laid on the form of the words ; when we observe, how he has expressed what is evidently the same meaning in other parts of the Will. Speaking of the sum of 4000*l.* to be equally divided among the said children, his expression is, "the share of the decesser to fall and belong to my heir under this Will ;" not there using the words

"revert and return." So in the general provision as to the whole of his legacies, he says, "in case of any of the legatees predeceasing me that his or her legacy shall fall, accrue, and belong to, my heir before mentioned."

These words seem to import a substantive gift to the daughter, in substitution for the other legatees, rather than a mere relief from the obligation to pay those legacies; and it is very difficult to satisfy these words by such a disposition as that the daughter [\* 353] should not take \* any part of them; that none of them should "fall, accrue, or belong, to" her; but that other persons should have the entire benefit of them. That construction seems adverse to the general intention. The testator no where provides, that any one legatee shall derive a benefit from the death of any other. Even in the case of his brother's children there is no survivorship; but the share of the "the deceased," which must mean any dying in his life, was to fall and belong to his heir under the Will. His daughter seems to be thus preferred even to the surviving children of his brother. It is difficult therefore to believe, that his intention could be to prefer to her all the legatees: yet that is the Defendant's construction; as the consequence of declaring, that the lapsed legacies shall merely fall into the bulk of the estate, would be, that the fund for the other legacies would be increased; and the sum they would have to contribute to the 10,000*l.*, would be diminished: the lapse therefore would be for the benefit of the other legatees, not of the daughter. She appears to me to be specially substituted for such of the other legatees as might die in his life.

Therefore the legacy to Bernard Rose is to be considered as subsisting for the benefit of the daughter: and must be so considered in the accounts, to be taken under the Decree.

1. WHERE a testator's assets are not ample, it must be obvious how important a difference it may make, whether a person can claim a lapsed legacy by substitution, or only as residuary legatee; for, in the former case, he will be on the same footing with other legatees, and, at worst, only have to abate proportionably with them; but, in the latter case, he can take nothing until the other legacies are fully satisfied: *Fonnereau v. Poynitz*, 1 Brown, 477; *Humphreys v. Humphreys*, 2 Cox, 186.

2. It is very old and very plain doctrine, that, when either a specific, a general, or a residuary legatee dies before his testator, the legacy given to the party so deceased lapses, and, *quatenus* the subject of such bequest, there is no will; unless (as in the principal case) some other person has been directed to take by substitution: *Stonywell's case*, T. Raym. 334.

3. Though there is no absolute repugnancy in giving a particular legacy to a residuary legatee; even when such residuary legatee is also (as in the principal case) the testator's executor; yet, under ordinary circumstances, the gift of a particular legacy to an executor raises a *prima facie* presumption, that he was intended to take the residue in trust only: *Langham v. Sanford*, 2 Meriv. 12, 17. But this presumption is capable of being rebutted, and, in the principal case, would have been quite untenable.

## MURRAY v. SHADWELL.

[1810, Nov. 23.]

REFERENCE, whether two suits are for the same matter, is obtained by Plea, in Chancery, as in the Exchequer; not by Motion (a).

MR. LEACH, for the Defendant, had moved for a reference to the Master to inquire, whether two suits were for the same matter; \* upon the authority of the Anonymous case [\*354] in Moseley (1); where it is stated, that though in the Court of Exchequer that objection must be taken by plea, in the Court of Chancery it may be by Motion.

The Lord CHANCELLOR [ELDON] said, he could find nothing in support of the Motion except that case in Moseley; and upon looking into notes of his own he found nothing confirming it; nor in the books of practice (2); according to which the regular way of obtaining this reference is by plea.

The motion was accordingly refused; but without costs, on account of that authority.

In the case of *Gage v. Lord Stafford*, 1 Ves. Sen. 544, S. C., Amb. 103, a motion that it might be referred to the Master to see whether two bills were for the same matter, and, if so, that one should be stopped, was refused: not, however, on the ground that the proper mode of obtaining the reference would have been by plea, but because the two bills were filed by different parties; and Lord Hardwicke was clearly satisfied, that although the foundation of the demand brought forward by each bill was the same, they proceeded upon different equities. And, it seems settled, that, where two suits are filed in the name of an infant, it is a motion of course to obtain a reference to the Master upon the allegation of counsel, that both suits are for the same purpose: without being put to the expense of a petition: *Sullivan v. Sullivan*, 2 Meriv. 43. But this indulgence to an infant plaintiff is certainly no reason why an adult defendant should obtain, by motion, what he ought to have asked by plea.

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(a) 1 Smith, Ch. Pr. 223.

(1) Mo. 268.

(2) Mitf. 197; Pract. Reg. edition by Mr. Wyatt, 329; *Daniel v. Mitchell*, ante, vol. i. 484; Bea. El. Pl. Eq. 134; Orders in Chancery, edition by Mr. Beames, 176, 7.

## TURNER v. BURLEIGH.

[1810, Nov. 24.]

## CROSS-EXAMINATION as to the execution of Deeds.

Order in the alternative ; either that the Examiner, with whom they were, should cross examine ; or that they should be delivered to the Examiner for the other party for that purpose (a).

Power of the Court of Chancery to examine *viva voce* (b).

SIR SAMUEL ROMILLY, for the Defendant, moved that publication may be enlarged ; and that deeds may be delivered over from the examiner for the Plaintiff to the examiner for the Defendant, for the purpose of cross-examination ; suggesting, that the latter part of the motion was necessary, by the effect of the Act of Parliament of \* the last Session (1) ; preventing an examination for both parties by the same examiner.

Mr. Heald opposed the Motion ; insisting, that it was contrary to the practice, that the deeds should be handed from one examiner to the other ; contending also, that there can be no cross-examination as to the fact of execution ; as upon the proof of a deed, as an exhibit, at the hearing.

Sir Samuel Romilly, in reply, said, that certainly there might be a cross-examination ; if any ground was laid for it ; upon the sanity of the grantor, for instance, or any other circumstance, attending the execution.

The Lord CHANCELLOR [ELDON].—Certainly there may be a cross-examination ; and in the case of an exhibit, proved at the hearing, the Court would examine *viva voce* at the hearing upon the sug-

(a) 1 Smith, Ch. Pr. 359.

(b) An examination *viva voce* at the hearing is admitted where written documents, essential to the justice of the cause, have been neglected to be proved previously ; or where the complainant, finding sufficient matter confessed in the defendant's answer to ground a decree upon, proceeds to a hearing of the cause upon bill and answer only. 1 Barbour, Ch. Pr. b. 1, ch. 10, § 3, p. 308; Hinde, Pr. 369 ; 2 John. Ch. 482 ; *Mills v. Pittman*, 1 Paige, 490.

It is said that, with the exception of documents coming out of the hands of a public officer having the care of such documents, (which are proved by the mere examination of the officer to that fact) no exhibit can be proved, *viva voce*, at the hearing, that requires more than the proof of the execution or of hand-writing, to substantiate it. *Lake v. Skinner*, 1 Jac. & Walk. 9, 15. If it be any thing that admits of cross examination, or that requires any evidence besides that of hand-writing, it cannot be received. *Emerson v. Berkley*, 4 Hen. & M. 441 ; *Ellis v. Deane*, 3 Moll. 63.

Witnesses are usually examined before Masters *viva voce*. 1 Barbour, Ch. Pr. b. 2, ch. 3, § 3, p. 502 ; 2 Smith, Ch. Pr. 138 ; *Trotter v. Trotter*, 5 Sim. 383.

(1) Stat. 50 Geo. III. giving power to the Lord Chancellor, &c. and the Master of the Rolls, if the increase of the business should render it necessary, to appoint two additional Examiners, and to settle the duties of the Examiner, and the distribution of the business of the office ; directing also, that the business shall be equally divided, as nearly as may be, between and among the Examiners ; and that the witnesses on different sides of the same cause shall (if the same be practicable) be examined by different Examiners.

gession of any question. In *Aylett's Case* (1), upon an Indictment for perjury, the question was made, whether this Court had the right of examining *viva voce*; and it was settled, that the examination may be in either way. The Court must take care, that the examination, in whatever \* way it takes place, shall be effectual; giving credit to the officer, that he will effectually examine; and, if the examination is improperly taken, both the interrogatory and the depositions must be suppressed. [\* 356]

The Motion stood over; in order to give an opportunity of seeing the Act of Parliament; which was not then published; and afterwards upon its production Sir *Samuel Romilly* observed, that it contained, though not a positive declaration, a strong intimation of the opinion of the Legislature against an examination by the same examiner for both parties; but, each examiner being equally the officer of the Court, it was immaterial, by whom the cross-examination was taken.

The Lord CHANCELLOR made the Order in the alternative; that either the examiner, in whose hands these deeds were, should cross-examine; or that they should be delivered over to the other examiner for that purpose.

In *Lake v. Skinner*, 1 Jac. & Walk. 15, it was judicially stated to be a rule perfectly established, and strictly to be adhered to, that, where an instrument, which *prima facie* appears to be an exhibit, requires farther proof than that of the mere hand-writing, and the evidence admits of cross-examination, the instrument cannot be received as an exhibit, or be admitted to be proved *viva voce*. So, in *Bloxton v. Druoit*, Prec. in Cha. 64, the plaintiff had obtained an order to prove a deed *viva voce*; but, at the hearing, it appeared that all the witnesses to the deed were dead, and the plaintiff was not allowed to prove, in this way, their hand-writing; but the cause was put off, with liberty for him to examine his witnesses formally, in the proper office, to prove the deed, notwithstanding publication in the cause had been passed. It seems, however, to have been Lord Hardwicke's opinion that the hand-writing of a witness to an instrument, offered as an exhibit, may, in certain cases, at any rate, be proved *viva voce*; though his lordship was most distinct in his declaration, that no examination whatever, which will admit of cross-examination, can be taken *viva voce*: *Lord Pomfret v. Lord Windsor*, 2 Ves. Sen. 479. Perhaps the distinction may be, that, where proof of the mere hand-writing is alone in question, that proof may be allowed to be given *viva voce*; but, where circumstances, throwing a light upon the transaction, may probably be elicited by a cross-examination, there the proof of the hand-writing must be more formally taken. For there are other cases, besides that last cited, in which the hand-writing, even of a living witness to an instrument, has been allowed to be proved *viva voce*: *Bank v. Fargues*, Ambl. 145, S. C., 1 Dick. 167. But the utmost latitude the court has taken in this matter is, to allow the proving of *mere exhibits* *viva voce* at the hearing; not to let in other examinations, or to exclude cross-examinations: *Graves v. Budgell*, 1 Atk. 445.

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(1) See *Gascoigne's Case*, ante, vol. xiv. 182.

## PRICE v. DYER.

[ROLLS.—1810, Nov. 29; Dec. 3.]

THOUGH a parol waiver of a written contract, amounting to a complete abandonment, and clearly proved, would bar a specific performance, or even parol variations, so acted upon, that the original agreement could no longer be enforced without injury to one party (*a*); variations, verbally agreed upon, are not sufficient to prevent the execution of a written agreement; the situation of the parties in all other respects remaining the same (*b*).

In this case the variations were all for the advantage of the Defendant by gratuitous covenants of the Plaintiff (*c*).

An agreement for a lease for seven, fourteen, or twenty-one, years, gives the option to the lessee alone (*d*), [p. 363.]

THE Bill prayed a specific performance of an agreement for a lease by Dyer. The agreement was in the following words:—

[\* 357]     \* “Memorandum of agreement between John Dyer of East Ham in the County of Essex and Daniel Price of Cornhill London wherein I do agree to let unto the said Daniel Price the house stabling gardens and field at the net rent of sixty guineas per annum on lease of seven fourteen or twenty-one years Daniel Price paying all taxes—to commence at Lady-Day next and Daniel Price does agree to take the fixtures as stated on the other side at a fair valuation. John Dyer, East Ham, 8th March, 1809.”

About ten days after that agreement the Defendant by parol agreed to demise to the Plaintiff an additional piece of land; and the rent

(*a*) The ground of this doctrine is, that Courts of Equity ought not to be active in enforcing claims, which are not, under the actual circumstances, just, as between the parties. 2 Story, Eq. Jur. § 770; 1 Sugden, Vendors, (10th Lond. ed.) ch. 3, §§ 8, n. 18 to 28, p. 224 to 231. Sir Edward Sugden states, that, whether an absolute parol discharge, not followed by any other agreement, upon which the parties have acted, can be set up, even as a defence in Equity, is questionable.

(*b*) In the case of a plaintiff seeking the specific performance of a contract, if it is reduced to writing, Courts of Equity will not ordinarily entertain a bill, to decree a specific performance thereof with variations or additions, or new terms, to be made and introduced into it by parol evidence; for in such a case, the attempt is, to enforce a contract partly in writing, and partly by parol, and Equity deems the writing to be higher proof of the real intentions of the parties, than any parol proof can generally be, independently of the objection which arises in many cases, under the Statute of Frauds. 2 Story, Eq. Jur. § 770a; see also, *ante*, note (*a*) *Townshend v. Stangroom*, 6 V. 328: note (*a*) *Brodie v. St. Paul*, 1 V. 326; note (*a*) *Hare v. Shearwood*, 1 V. 241.

(*c*) Where the defendant sets up in his defence to a bill for the specific performance of a written contract, that there has been a parol variation or addition thereto by the parties, if the plaintiff assents thereto, he may award his bill, and, at his election, have a specific performance of the written contract, with such variations or additions so set up; for, under such circumstances, there is a written admission of each party to the parol variation or addition; and there can be no danger of injury to the parties, or evasion of the rules of evidence or of the Statute of Frauds. 2 Story, Eq. Jur. § 770a; *The London and Birmingham Railway Co. v. Winter*, 1 Craig & Phillips, 57.

(*d*) See *ante*, Hovenden's note, *Dann v. Spurrier*, 7 V. 236; *Doe v. Diron*, 9 East, 15. This is upon the principle that every doubtful grant is to be construed in favor of the grantee.

was to be increased to 65*l.* The Plaintiff took possession on the 25th of March, 1809.

The Defendant set up a parol agreement, on the 2d of April, 1809, made at the office and in the presence of his Solicitor; by which the parties mutually abandoned the terms of the written agreement; and agreed, that the lease should not be for the term of twenty-one years absolute in all events; but should be determinable by Dyer at the expiration of seven or fourteen years; unless the Plaintiff should within the first seven years build two good rooms southward of the dwelling-house; but, if the Plaintiff did build the said two rooms within that time, then the lease was to be absolute for the whole term of twenty-one years; but the precise sum, to be laid out in building the said rooms, was not then finally agreed upon; and it was also at the same time agreed between the Plaintiff and the Defendant, that the annual rent should be 65*l.*; and that the Plaintiff should insure the premises against fire; and should not underlet, or assign, without a written license from the lessor; and that the field should not be broken up or ploughed; and that all the usual \* covenants should be inserted in the lease. The [\* 358] Defendant's Solicitor took a note of the new agreement in the following words:—

"Lease for seven fourteen and twenty-one years in consideration of Mr. Price laying out the sum of £ in building two rooms southward of the dwelling-house within the first seven years then the lease to be absolute for twenty-one years rent 65*l.* per annum—Mr. Price to insure the premises—not to let or assign without leave in writing of the lessor; and that the field should not be broken up or ploughed."

The Defendant insisted, that the possession had been retained by the Plaintiff, not upon the terms of the original agreements, but upon the terms and conditions of the last verbal agreement.

(1) Sir *Samuel Romilly*, Mr. *Sugden*, and Mr. *Garratt*, for the Plaintiff.—Under the original agreement the option to determine the lease was in the Plaintiff only: *Danx v. Spurrier* (2). Doe, on the demise of *Webb v. Dixon* (3). The lease being at rack-rent, the lessee would not be bound to insure; and the lessor was not entitled to a covenant against assignment without his consent: *Vere v. Lovenden, Jones v. Jones* (4). It cannot be contended, that the original written agreement was waived. Lord Hardwicke in *Buckhouse v. Crosby* (5), though he would not say, that a contract in writing would not be waived by parol, \* declared that he [\* 359] should expect in such case very clear proof; and observed, that the Statute requires, that all agreements concerning land should be in writing; and an agreement to waive a contract for purchase is

(1) The arguments *ex relatione*.

(2) *Ante*, vol. vii. 231; 3 Bos. & Pul. 339, 442.

(3) 9 East, 15.

(4) *Ante*, vol. xii. 179, 186. See the note, *Church v. Brown*, xv. 258.

(5) 2 Eq. Ca. Abr. 32, pl. 44.

as much an agreement concerning lands as the original contract. In *Bell v. Howard* (1) the same Judge said, that an interest in land could not be parted with or waived by naked parol, without writing; although it might be used to rebut the equity to have articles specifically performed. There is no decision, though there are *Dicta*, that a written agreement can be waived by parol. In *Goman v. Salisbury* (2) that is stated: but the case is not in the Register's Book. In *Legal v. Miller* (3) the parol agreement was executed: the tenant had built under it. So in the *Anonymous case* in Viner (4) the tenant had repaired; and it was considered by the Court as a new agreement, in part performed. In this case the evidence cannot be used to rebut the Plaintiff's equity. There is no fraud on the part of the Plaintiff; who received no consideration for the new agreement. The option to determine the lease was in him alone under the first agreement. All the terms of the new agreement are in favor of the lessor, without any consideration whatever given by him. In *The Marquis of Townshend v. Stangroom* (5) the Lord Chancellor said, those, producing evidence of mistake or surprise, either to rectify an agreement, or calling upon the Court to refuse a specific performance, undertake a case of great difficulty. *Woollam v. Hearn* (6) was a case of fraud. This is an attempt to impose worse terms upon the tenant without any consideration.

[\* 360] The circumstance, that the \* parol agreement was reduced into writing by the Solicitor, is not material: *Gunter v. Halsey* (7). The possession, taken under the written agreement, cannot be referred to the subsequent parol agreement: *Wills v. Stradling* (8): nor can the Defendant ground any equity upon the circumstance, that he was not aware of the effect of the written agreement; giving the option to the lessee alone: *Mildmay v. Hungerford* (9).

Sir Arthur Piggott and Mr. Horne, for the Defendant.—Though the effect of the agreement certainly is, that the tenant has the option; according to *Dann v. Spurrier* (10), it may be shown in equity, that the mutual intention of both parties was otherwise: neither of them conceiving the effect of it to be an absolute term of twenty-one years. The Defendant, admitting the agreement, may show, that by fraud, mistake or surprise, the agreement, as expressed, does not contain all the terms of the actual contract. The Plaintiff admits the variation. In order to create an absolute term, which neither party thought was the effect of the old agreement, it was discharged by

(1) 9 Mod. 302.

(2) 1 Vern. 240.

(3) 2 Ves. 299.

(4) 5 Vin. 522, pl. 38.

(5) *Ante*, vol. vi. 328; see 339.

(6) *Ante*, vol. vii. 211.

(7) *Ambl.* 586.

(8) *Ante*, vol. iii. 378.

(9) 2 Vern. 243.

(10) *Ante*, vol. vii. 231; 3 Bos. & Pul. 339, 442.

their mutual consent ; entering into the fresh agreement ; which was reduced into writing at the time ; and has therefore all the effect, and secures the protection, of written testimony. The Defendant's Solicitor has been cross-examined. The old agreement being abandoned, the Plaintiff's equity is gone. The effect of the evidence is, not to vary, or deny, the agreement ; but to show, that it was abandoned ; and that the Plaintiff is not entitled to the assistance of a Court of \* Equity. Mr. Sugden, in his valuable [\* 361] book (1), after having stated all the cases, draws this inference from them :

1st. Of a parol discharge of an agreement in writing the most unequivocal proof will be expected :

2dly. If proved to the satisfaction of the Court, it can be used only as a *defence* to a bill, demanding a specific performance ; and is totally inadmissible at Law, or even in Equity, as a ground to compel a performance in *specie* ; unless,

3dly. There has been such a part-performance of the new parol agreement as would enable the Court to grant its aid in the case of an original, independent, agreement ; and then in the view of Equity it is equivalent to a written agreement.

These results are accurately collected ; and the case of *The Marquis of Townshend v. Stangroom* (2) proves the distinction in these cases.

Then, as to the effect of the evidence, no suspicion is cast upon it ; and, giving credit to the witness, the conduct of the parties cannot be reconciled with the conclusion, that the Plaintiff was to have an absolute term of twenty-one years. The part-execution of the first agreement cannot prevent its discharge. The agreement originally was binding ; but the subsequent conduct amounts to a discharge ; and the Plaintiff, attempting to violate that, and set up again the original contract, is acting in a Court of Equity against conscience.

Under the Statute of Frauds (3) a written surrender was never considered essential to an executory agreement ; and that Statute has no application to this question ; \* whether the [\* 362] conduct of the parties does not meet their demand of a specific performance. The provisions of the Statute, as to Wills, extend to revocation ; but contracts, the Act being confined to their creation, may be rescinded by parol. The doctrine of *Goman v. Salisbury* was expressly admitted in *Legal v. Miller*. The opinion in *Buckhouse v. Crosby* was extrajudicial ; and the evidence was read ; although the Court did not think it strong enough to act upon. In *Coles v. Trecotthick* (4) the Lord Chancellor lays down as a clear proposition, that an agreement in writing may be discharged by parol.

(1) *Law of Vendors and Purchasers*, 3d edit. 113, 14 ; 5th edit. 133.

(2) *Ante*, vol. vi. 328, and the authorities there cited.

(3) Stat. 29 Ch. II. c. 3.

(4) *Ante*, vol. ix. 234 ; see 250.

Sir *Samuel Romilly*, in reply.—The case of *Goman v. Salisbury* cannot be considered as an authority. Mr. Sugden (1), states in his book, that he could not discover that case in the Register's Book; and Mr. Raithby in the last edition of Vernon does not refer to it. The agreement gives the purchaser an interest during the term; which is equivalent to a real interest. This interest has not been waived. The possession was under the agreement; and, as it was continued, cannot be referred to any new agreement. The utmost amount of this evidence is only a variation of the terms. To resist the execution of an agreement there must be a case of fraud, mistake, or surprise; according to *The Marquis of Townshend v. Stangroom*. There was no binding parol agreement: no consideration to the lessee for giving up so much: the option being in him alone: no fraud, mistake, or surprise; upon which a specific performance can be represented as an injury to the lessor: the only ground, [\* 363] for admitting \* parol evidence. The stipulation for expenditure by the tenant in building is for the benefit of the lessor.

1810, Dec. 3d. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—There are two things to be considered in this cause; First, whether the agreement of the 8th of March, 1809, was originally such as this Court would have carried into execution: if it was, then, whether what passed subsequently ought to prevent a specific performance. The answer does not state any objection to the agreement, as being unfair or incorrect. It was indeed contended in argument, that the parties did not mean it to be, what it is admitted to be in legal operation, an agreement for a lease for seven, fourteen, or twenty-one years, at the option of the lessee; and that inference is drawn from the Plaintiff's willingness to comply with certain additional terms, upon which he was to have a lease for twenty-one years absolutely. Upon that it is enough to say, it is by no means a necessary inference; and I do not see, how it is possible to deny effect to a written agreement upon the ground, that it does not fairly state the meaning of the parties; where the Defendant does not allege that to be the case in fact, or even according to his own conception of it. This agreement must therefore be taken to have been originally unexceptionable.

It is then said, that the agreement was waived; and that a written agreement may be so far waived by parol, that the Court will refuse the interposition of its equitable jurisdiction to enforce it. Not conceiving, that there was in this case any waiver, within the meaning of the *dicta*, or decisions, upon this subject, it is not necessary for me to give a precise opinion upon the point; but, as at present advised, I incline to think, that upon the doctrine of this [\* 364] \* Court such would be the effect of a parol waiver, clearly

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(1) Law of Vendors and Purchasers, 5th edit. 128, &c.; 3d edit. 110; 2d edit. 97.

and satisfactorily proved: but here was no such waiver. The waiver spoken of in the cases, is an entire abandonment and dissolution of the contract; restoring the parties to their former situation. No such thing was for a moment in the contemplation of these parties. From the history of the transaction, in the answer and the evidence of the solicitor, all they at any time meant was to add to or modify the terms of the original agreement.

The question then is upon the effect of the variations, said to be agreed upon. Variations, so acted upon, that the original agreement could no longer be enforced without injury to one party, would be a bar to a specific performance of that original agreement. Such was the case of *Legal v. Miller* (1). The original agreement was unexceptionable: but the execution of it under the new circumstances would have been a fraud upon the landlord; having rebuilt, instead of repairing, the houses; and the tenant having agreed to pay an additional rent in consideration of the additional expense. But variations, verbally agreed upon, supposing any to have been so agreed upon in this case, are not sufficient to prevent the execution of a written agreement: the situation of the parties in all other respects remaining unaltered. The Defendant has expended nothing upon the faith of having the added stipulations performed. He has sustained no positive loss. He will only be disappointed of that advantage, which he expected to derive from the gratuitous covenants of the Plaintiff. Gratuitous they clearly are; as it cannot be seriously represented, that the obligation to build can be considered a privilege conferred upon him.

\* I am not therefore warranted upon authority or principle to refuse a specific performance of the written agreement: but under the circumstances of the case I do not think the Plaintiff entitled to the costs of the cause. [\* 365]

See the notes to *Jordan v. Hawkins*, 1 V. 402; the notes to *The Marquis Townshend v. Stangroom*, 6 V. 328, with the farther references there given; and also note 7 to *Coles v. Trecothick*, 9 V. 234.

(1) 2 Ves. 299.

## BULLPIN v. CLARKE.

[ROLLS.—1810, DEC. 4.]

DECREE for payment of a debt by the promissory note of a married woman out of the rents and profits of estates, settled to her separate use for life (a).

By indentures, dated the 2d and 3d of May, 1806, previous to the marriage of the Defendants John and Margaret Clarke, several real estates, to which Margaret Clarke was entitled under the Will and settlement of her former husband, were conveyed to the Defendants Parnell and Lloyd and their heirs ; to the use, after the marriage, of Parnell and Lloyd and their heirs ; upon trust to receive the rents and profits ; and pay the same to such person or persons, for such uses, intents, and purposes, as Margaret Clarke should at any time during her life notwithstanding her coverture direct or appoint ; and, in default of such direction or appointment, to pay the same into the proper hands of Margaret Clarke for her sole and separate use and benefit ; and all the debts, ready money, rings, jewels, plate, linen, pictures, household goods, furniture, and all other the personal estate, of Margaret Clarke were assigned to Parnell and Lloyd, their executors, administrators, and assigns, in trust to or for the sole and separate use of Margaret Clarke ; and to be applied and disposed of, as she should direct or appoint.

By other indentures of the same date, estates of John Clarke were conveyed to the same trustees ; to the use, after the marriage, of John Clarke for life, without impeachment of waste ; and from and after his decease to the use of Margaret Clarke and her assigns for life ; with remainder over.

[\* 366] \* The Bill was filed against Clarke and his wife and the trustees ; stating, that in 1806 Margaret Clarke requested the Plaintiff to lend her 250*l.* ; which she promised should be repaid to him with interest out of her separate property ; and the Plaintiff, knowing, that she had such separate property, accordingly advanced her that sum for her separate use ; and she gave him her promissory note for the sum of 250*l.* with lawful interest upon demand, dated the 4th of October, 1806. By a letter, from Mrs. Clarke to the Plaintiff, in answer to an application for repayment, she expressed herself thus :

"Having received a letter from Parnell, that you are very anxious for your money, which I borrowed some time ago, if you believe me, when I assure you, I am doing all I can to forward it ; and hope to accomplish it soon ;" stating farther, that she had some property of one of her tenants ; but could not turn it into cash, until the grain was threshed out ; that her husband was going into Gloucestershire, where he expects to receive a large sum of money : "and will from

(a) See ante, note (a) *Sperling v. Rockfort*, 8 V. 174, and note (a), p. 182 ; note (a) *Anderson v. Dawson*, 15 V. 532.

thence remit you upon my account the 250*l.* with the interest due thereon ; " and that some time ago she requested Mrs. B. to say, she would remit him his money as soon as possible.

The Bill charging, that the trustees are in possession and receipt of the rents and profits for the separate use of Margaret Clarke, and also hold personal property, as trustees for her separate use, and that the 250*l.* is wholly her separate debt, and was received by her, and applied for her own use, and was advanced and lent by the Plaintiff on the faith and credit of her separate estate and property, prayed payment out of the rents and profits, or otherwise out of her separate property ; an account of the debt and interest : and of the separate property received by the trustees &c. and, if it \* shall [\*367] appear, that she is herself in possession, that a Receiver may be appointed.

The note and the letter were admitted by the Answer.

Mr. Hart and Mr. Roupell, for the Plaintiff.

Sir Samuel Romilly, for the Defendants.—(1) This is a new and important question. The promissory note is not the execution of a power ; an appointment of any part of this settled property ; and has no reference to it ; constituting merely a debt by simple contract. There is no authority, establishing the right of a Court of Equity to apply the rents and profits of the separate estate of a married woman to the payment of a debt.

The Decree directed the trustees to receive the rents and profits of the several estates in the indenture mentioned ; that an account should be taken of what was due to the Plaintiff for principal, interest, and costs, upon the note of the Defendant Margaret Clarke ; and that the trustees shall pay to him what shall be found due in respect of such principal, interest, and costs, out of such rents and profits ; that they shall account annually for the rents and profits ; and pay to the Plaintiff the balance, which shall from time to time be reported due ; until the principal, interest, and costs, shall be fully paid (2).

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See the notes to *Sperling v. Rockfort*, 8 V. 164, with the farther references there given.

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(1) *Ex Relatione.*

(2) See the note, *ante*, vol. v. 17.

## JONES v. DAVIS.

[1810, DEC. 6.]

THE authority to take the Bill *pro confesso* against a Defendant, having privilege of Parliament, standing out process of contempt, under Statute 45 Geo. III c. 124, s. 5, is confined to Bills for discovery only.

A MOTION was made, that the Bill be taken *pro confesso*, under the late Act of Parliament (1) : the Defendant being a Member of Parliament.

Mr. Johnson, in support of the Motion, suggested a doubt, whether the Act gave this jurisdiction, unless where the Bill was for discovery only ; the 5th Section of the Act, upon which this Motion must be made, relating to Bills for discovery only ; not to Bills for relief ; as the preceding clause.

The Lord CHANCELLOR [ELDON], observing, that the 5th Section of the Act appeared to go only to Bills of Discovery, refused the Motion.

SEE the note to *Downes v. Thomas*, 7 V. 206.

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(1) Stat. 45 Geo. III. c. 124, s. 5. The 4th sect. declares, that upon the return of process of Sequestration for not putting in an Appearance to any original or other Bill for discovery and relief, or discovery alone, as the case may be, upon producing such return, &c. the Court may upon Motion appoint a Clerk in Court to enter an Appearance for such Defendant, having privilege of Parliament. The 5th sect. reciting, that it is necessary on the part of persons, having legal rights, against persons, having privilege of Parliament, to proceed by Bill in equity against such persons, to obtain from them discovery on oath of facts, intended to be used as evidence in Courts of Law against the persons, making such discovery ; and in case such persons stand out process of contempt, the parties have not sufficient means of compelling the same, therefore declares, that when a Defendant, having privilege of Parliament, shall have appeared to any Bill, seeking discovery upon oath, or when an appearance shall have been entered according to such provision, as aforesaid, and such Defendant shall refuse or neglect to answer, then an application may be made to have the Bill taken *pro confesso*.

In *Logan v. Grant*, 1 Madd. 626, Sir T. Plumer, V. C. refused to follow this case.

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## 50 GEORGE III. 1810.

COOMBE, *Ex parte.*

[1810, DEC. 7.]

EQUITABLE mortgage by deposit of deeds not favored; especially when contradicting a written instrument (*a*).

THIS Petition stated, that in January, 1810, judgment was entered up by Meaux and Co. against the bankrupt John Morgan, a victualler; and execution issued on that judgment for 1560*l.* 6*s.* 5*d.* Morgan applied to the petitioners to pay off that debt; and to supply him with porter; to which they agreed upon the terms of his executing a warrant of attorney, and a defeasance, and depositing the lease of his house, as a collateral security for the money, advanced by them, not exceeding 1500*l.* A warrant of attorney was executed accordingly for 3000*l.*; dated the 20th of January, 1810; with a special defeasance; stating, that the petitioners had on that day advanced and lent to the said John Morgan 1250*l.*; and that he had deposited with them a certain lease and assignment of his messuages and premises, as a collateral security for the payment, as well of the said 1250*l.* and interest, as of all such farther or other debt or debts, not exceeding with that sum 1500*l.*, which should hereafter become due from him to them.

\* The Petition farther stated, that on the 20th of January, 1810, the Petitioners paid on account of Morgan to Meaux and Co. 1082*l.* 1*s.* 10*d.* money lent: their beer account, 98*l.* 2*s.* 6*d.*; all the expenses to their Solicitor 51*l.* 17*s.* 2*d.*; Sheriff's poundage 11*l.* 9*s.* 10*d.*; and their own Solicitor's expenses in preparing the security, &c. 9*l.* 5*s.* 4*d.*: in all 1252*l.* 16*s.* 8*d.*; and thereupon Meaux and Co. delivered to them the lease, deposited with them as a security by Morgan. The Petitioners for some time supplied the bankrupt with beer: but being dissatisfied with him they entered up judgment on the 14th of August; and levied execution for 1420*l.* 14*s.*; but the Commission having issued on that day, they withdrew their execution; abandoning their security for that

(a) Owing to the system of Registration, the questions arising from the deposit of Title-deeds are of less importance in the United States than in England. See *ante*, note (a) *Ford v. Peering*, 1 V. 72.

As to Equitable mortgages, see *ante*, note (a) *Ex parte Coming*, 9 V. 115; note (a) *Ex parte Wetherell*, 11 V. 398; 4 Kent, Com. (5th ed.) 150, *et seq.*; 2 Story, Eq. Jur. § 1020, and notes; *Keye v. Williams*, 3 Y. & C. 61; *Mandeville v. Welch*, 5 Wheat. 277, 284; *Paine v. Smith*, 2 Mylne & Keene, 417; *Russel v. Russel*, Bro. C. C. (Am. ed. 1844), 269, 270, and notes.

part of their debt, which arose from beer sold, amounting to 182*l.* 6*s.* 2*d.* which sum they proved as a debt under the Commission.

The Petition, claiming the benefit of the lease as to the residue of their debt, praying a sale of the premises.

Mr. Cooke, in support of the Petition, admitting, that the act of bankruptcy over-reached the transaction of the 20th of January, contended, that the Petitioners were entitled to stand in the place of Meaux and Co. who had an execution actually levied; which could not have been displaced by any act of bankruptcy; and the Petitioners therefore, advancing their money for the purpose of paying off that debt of Meaux and Co. were entitled to stand in their place.

The Lord CHANCELLOR [ELDON].—There is nothing, that requires to be watched with more jealousy than this doctrine of lien by the deposit of deeds (1); especially when the inference con- [\* 371] tradicts a \* written instrument. The question is, whether the delivery of the lease by Meaux and Co. is evidence of an agreement for an assignment from them, not in their own right, but as agents of the bankrupt; making it, not their, but his, deposit; and whether the parties are not bound by the express recital in the defeasance, that Morgan had deposited the deeds. The Petitioners might unquestionably have dealt for the benefit of the deposit, that Meaux and Co. had: but suppose, at the instant of the deposit by the bankrupt, as represented by this instrument, an actual mortgage had been made by Morgan alone: the Petitioners could not in Equity have claimed the deposit, that Meaux and Co. had. Then can they be in a better situation, taking only a deposit, than they would have been in, having an actual mortgage?

The Petition was dismissed. —

1. ANOTHER report of this case may be found in 1 Rose, 268.
2. For a summary of the doctrines established with respect to (what are called) equitable mortgages, see, *ante*, the notes to *Ex parte Coming*, 9 V. 115, and particularly note 3 to that case, for an affirmative answer to the question, whether an imperfect assurance, by deposit of deeds, can ever give more extensive rights than a formally completed mortgage would do.

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(1) *Ante, Ex parte Langton*, 227; *Ex parte Mountfort*, vol. xiv. 606, and the references in the note, ix. 117, *Ex parte Coming*.

## THE ATTORNEY GENERAL v. PRICE.

[ROLLS.—1810, Nov. 26.]

**DEVISE** to A. and his heirs; with a direction, that yearly he and his heirs shall forever divide and distribute according to his and their discretion amongst the testator's poor kinsmen and kinswomen, and amongst their offspring and issue dwelling within the County of B. 20*l.* by the year.

This is in the nature of a charitable bequest; and, the Will being made in 1581, was sustained; and inquiries directed as to the poor relations dwelling within the County of B. (a).

WILLIAM EVANS by his Will, dated the 3d of August, 1581, devised all his messuages, lands, &c. to his wife for the term of forty years, if she should \* so long live; and after her [ \* 372] death to Evan Johnes and his heirs; with the following direction:

"Also that he the said Evan Johnes shall at what time soever the possession of the same premises shall fall and come to him by virtue of this my Will that yearly from thenceforth he the said Evan Johnes and his heirs shall forever divide and distribute according to his and their discretion amongst my poor kinsmen and kinswomen and amongst their offspring and issue which shall dwell within the county of Brecon the sum of 20*l.* by the year without fraud and collusion."

The Will then proceeded to direct, that the said Evan Johnes and his heirs should give and pay out of the same messuages, &c. every year for ever to the use of the poor of the parish of St. George, Southwark, 5*l.* 4*s.* quarterly; with directions for the distribution.

The Information and Bill was filed by three poor relations of the testator, on behalf of themselves and all others. The Answer submitted, that the devise to the poor relations was void for uncertainty.

Mr. Hart and Mr. Shadwell, in support of the Information, contended, that this must be considered as a charitable devise; referring to the case of *White v. White* (1); as an instance of a bequest to poor relations, sustained as a charitable bequest.

Mr. Richards, Sir Samuel Romilly, and Mr. Wyatt, for the Defendants, distinguished that case: as a fund to be immediately applied in putting out as apprentices poor relations, of two families specified; which was properly \* a charity to the [ \* 373] persons, answering that description: this being a trust to

(a) For the cases and principles illustrating the subject of Charities in the United States, see *ante*, note (c) *Attorney General v. Bowyer*, 3 V. 714; note (a) *Attorney General v. Andrew*, 3 V. 633; notes (a) and (c) *Moggridge v. Thackwell*, 7 V. 36.

Where the gift is to trustees, with general objects, or with some particular objects pointed out, there the Court of Chancery will take upon itself the administration of the Charity, and execute it under a scheme to be reported by a Master; 2 Story, Eq. Jur. § 1190.

(1) *Ante*, vol. vii. 423.

distribute an annual payment among persons, denoted merely by the general description, "poor kinsmen and kinswomen."

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—This appears to me to be in the nature of a charitable bequest: particularly upon the case of *Isaac v. De Friez* (1); which is both imperfectly and erroneously reported.

[\* 374] This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance, in favor of a particular description of poor; and is not like an immediate bequest of a sum to be distributed among poor relations.

An inquiry was directed, whether the Plaintiffs are poor relations of the testator; and whether there are any others of his poor relations, who dwell within the county of Brecon.

An immediate bequest to "poor relations," must be applied to the use of such poor relations only as come within the degrees prescribed by the Statute of Distributions; but a donation in the same terms, if intended to found an endowment of permanent duration, will be supported as a charity, in favor of all such relations of the testator as are poor and proper objects: see, ante, note 5 to *Brown v. Higgs*, 4 V. 708.

(1) Amb. 595, Reg. Book, A. 1753. Nathan Simpson by his Will, dated the 3d of August, 1725, bequeathed to his eldest sister Grace Plout an annuity of 50*l.* during her life: and after her decease he gave the same unto his own and his then present wife Dyfie Simpson's poorest relations, to be distributed and paid to them and such of them proportionably share and share alike, at the discretion of his executors. He also gave to his sister Rose Kizer, the like annuity of 10*l.* during her life, with a similar disposition over after her decease. He farther gave the interest of his stock to his wife; and after her decease one half year's interest to one poor relation of his own, either male or female, for a portion in the way of marriage, and putting him or her out in the world; and the other moiety in the same manner to one poor relation of his wife; the direct management thereof to be left to the discretion of his executors: and if his own and his said wife's relations should be extinct, then he gave the said stock and securities, and the produce, as therein mentioned.

The Bill was filed by the trustees under the Will; and the Attorney General was a Defendant with some of the poor relations.

The Decree declared, that the charity should be established; and directed an account of the arrears and growing payments of the annuities, and of the dividends of the stock, &c.; any of the parties to be at liberty to lay a scheme before the Master for carrying the said charity into execution according to the intention of the Will; and an inquiry, whether the Defendants, the De Friezes, or either of them, are poor relations, or a poor relation of the testator: with liberty to any other poor relations of him or his late wife to go before the Master, to claim such benefit as they may be entitled to under the charitable bequest in the Will.

See also *Brunaden v. Woarridge*, Amb. 507.

ROSS, *Ex parte* (1).

[1810, DEC. 7, 8.]

**R**Ight of a bankrupt, without regard to his conduct, to an inspection of his books, &c. under the Statute 5 Geo. II. c. 30, s. 5, for the purpose of his Examination; to a list of the debts proved; and to have wearing apparel delivered up to him. What may be retained as his necessary wearing apparel, within the terms of the exception, must be determined by him at his last Examination at the peril of indictment.

Petition, failing as to the principal objects, dismissed generally, [p. 376.]

THIS Petition was presented by a bankrupt; praying, that the assignees under the Commission may be ordered to furnish him with a list of the debts, proved; to deliver up to him his necessary \* wearing apparel; and to permit him to have an inspection of his books; for the purpose of preparing his examination. [\* 375]

The Petition was opposed by the assignees upon affidavits as to bankrupt's conduct; representing him as harassing and oppressing his assignees; that he had threatened them with ruin; that he was in affluent circumstances; and the wearing apparel, of which he prayed the delivery, consisted of some old clothes of little value; which could not be represented as *necessary* within the exception of the Act of Parliament (2), to a man in his situation; that he had directed his clerk, if a docket should be struck against him, to transfer stock into his brother's name; that the books he had delivered were fabricated for the purpose; and he had applied for the inspection only at unseasonable hours.

Sir *Samuel Romilly* and Mr. *Johnson*, in support of the Petition, insisted, that all the facts, contained in these affidavits, were immaterial with reference to the objects of this Petition; to which the bankrupt, whatever his conduct had been, was entitled by law.

The Lord CHANCELLOR acceded to that; and directed the Counsel for the Assignees to confine themselves to the question of law.

Mr. *Leach* and Mr. *Montague*, for the assignees, who had, since the Petition was presented, furnished a list of the debts, admitting the right to an inspection for the purpose of the examination, resisted it in this instance; as being sought with a fraudulent object, directed against the creditors. As to the wearing apparel they referred to \* the cases upon acts of insolvency; contending, that it might be of such a description and in such a quantity, as could not fall within the terms of the exception in the act "necessary wearing apparel;" and concluded, that the Petition, if it could not be sustained upon the principal point, should, according to the course now established, be dismissed generally. [\* 376]

The Lord CHANCELLOR [ELDON].—This Petition had three ob-

(1) 1 Rose's Bank Cases, 33.

(2) Stat 30 Geo. II. c. 5, s. 1; repealed and re-enacted with alterations by Stat 6 Geo. IV. c. 16, s. 1, 112.

jects ; one of which is now out of the question ; as to the list of debts. That demand, it seems now to be admitted, was reasonable ; and a list has been furnished. The observation is fair, that a Petition, containing a variety of objects, as to the great bulk of which it fails, has in some instances been dismissed altogether. The remaining objects of this Petition however are but two ; and, considering the necessary connection of both those objects with the Act of Parliament, it would be too much to refuse an Order as to one, on the ground that I could not make one upon the other object ; if such had been my opinion.

With regard to the question as to the wearing apparel, I was anxious, that it should be argued, first, whether, let the conduct of the bankrupt, previous to his last examination, have been what it may, taking it to have been as fraudulent as can be represented, I can upon any suspicion (it is no more) deprive him of that, which the Act of Parliament seems, at least according to its obvious interpretation, to have given him. The most satisfactory mode of considering that is to look at the preamble to this section (1) of the Act ; which, I observe, professes to give this right to persons, represented as most dis-

honest : the first clause relating to persons, in the habit of  
[\* 377] \*acting with the most fraudulent intention towards their  
creditors, whence might be inferred, even by the liberties  
given by the Statute, to continue those frauds : yet they are not  
made subject to penalties, unless upon the last day they refuse to  
make a full disclosure.

These persons, put under such restraints, having by a subsequent section (2) of the act this liberty of inspecting the books, among other rights, given to them, have I a discretion to deprive them of it on the ground, that their conduct was as fraudulent, as it is in the first section supposed to be : the object in giving that liberty being to afford them the means of reforming their conduct upon the day of the examination in all those respects, as to which they are described as previously dishonest ? An inspection of the books in the hands of the assignees, as well as of any, which the bankrupt may have, may be necessary for an examination as particular and precise as the first section refers to. The conclusion from both clauses is that the object of the Legislature was to give a fraudulent man the opportunity of reforming, and becoming honest, by the means here prescribed ; one being an inspection of his books, papers, and writings ; with the assistance of such persons, not exceeding two at one time, as he shall think fit ; leaving to the discretion of the bankrupt to say, who shall assist him in acquiring that information, with reference to which, if incorrect, his life is in hazard.

It has been urged, that the object of this bankrupt in requiring the inspection is, not to enable him to make a full and free disclosure of his affairs, but to commit a fraud ; and by some means defeat his

(1) Stat. 30 Geo. II. c. 5, s. 1.

(2) Sect. 5.

creditors in consequence of the knowledge to be derived from this inspection. The Legislature, though they must have foreseen that \* possible consequence, refusing upon the suspicion, that persons, once dishonest, will continue so, to impose upon the bankrupt at the hazard of his life the impracticable duty of putting in his examination, without the inspection, have left me no discretion. Taking his conduct to have been as fraudulent, as it can be represented, I have no authority to say, he shall not have an inspection : nor the assignees to refuse it.

What is the mischief to be apprehended ? The bankrupt has not yet passed his examination. If upon that examination it can be made out, that he has concealed, or has not delivered up, a particular book, he may be indicted under the Statute : but, on the other hand, if by an honest disclosure he sets right all, that was the subject of imputation, he places himself in the situation, in which this law proposes to place him. Upon this part of the case therefore I have no difficulty.

With regard to the question as to the wearing apparel, I am considerably disappointed at not having the assistance of any authority: The cases upon Acts of Insolvency prove nothing. The insolvent debtor does not act under the same peril as a bankrupt. It has happened of late, that these acts have been applied to bankrupts. It was not so formerly ; and the effect is, that their situation is considerably altered : bankrupts standing under a peril, affecting their lives, to which insolvent debtors, not bankrupts, are in no degree liable. A bankrupt therefore by being made the object of an Insolvent Act is relieved from high responsibility. This question seems excluded by the Insolvent Acts ; fixing the value of the apparel, and tools and utensils, which the debtor is to retain ; unless the amount specified should be held to refer to the tools and utensils only ; which construction would raise the same question ; and considerable difficulty \* may certainly arise upon the point, what [\* 379] is necessary wearing apparel : a question, which, if the bankrupt had these clothes, could not well be tried except by a capital indictment ; under which he would be liable to forfeit his life by not delivering up every thing, that does not fall within the exception of the Act. If once in his possession, he would have held them at his risk ; and the assignees ought to be put to deliver them to him at the risk of their opinion. The proper Order therefore, if it should be necessary to draw up an Order, will be, that the assignees shall deliver to him his necessary wearing apparel (1).

1. This case is likewise reported in 1 Rose, 33.
2. See, *ante*, the note to *Twogood v. Swanston*, 6 V. 485.

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(1) See 2 Christ. Bank. Law, 183, 4.

JONES, *Ex parte* (1).

[1810, Dec. 8.]

A WITNESS, refusing to attend the Commissioners to prove the act of bankruptcy, ordered to attend them.

This Petition was presented upon the refusal of a witness, to attend the summons of the Commissioners, to prove the act of bankruptcy: the Commissioners conceiving, that they had no authority to compel the attendance of the witness for that purpose.

Sir *Samuel Romilly* and Mr. *Wingfield*, in support of the Petition, admitting, that several Orders had been made by the Lord Chancellor in such cases (2), for the attendance of witnesses, suggested, that the Commissioners have the same power over witnesses before, as after the declaration of bankruptcy.

The Lord CHANCELLOR [ELDON].—Whether the Commissioners have, or have not, such an \*authority, they must determine for themselves: but I will not mislead them by a declaration to the effect, that has been suggested; as my Order would not protect them from an action. It has been thought right that for the due execution of a Commission such a power must exist somewhere; and, as several Orders have been made here for the attendance of witnesses in such cases, it is better to follow that course.

The Order was that the witness should attend the Commissioners at such time and place as they should appoint.

1. This case is likewise reported in 1 Rose, 39.

2. The power of commissioners of bankrupt to compel the attendance of witnesses is provided for by the 24th, 33d, 34th, and 37th sections of the statute of 6 Geo. IV. c. 16.

(1) 1 Rose's Cases in Bankruptcy, 39.

(2) *Ante, Ex parte Lund*, vol. vi. 781; *Ex parte Higgins*, xi. 8; see the note, vi. 784, and the Statute 6 Geo. IV. c. 16, s. 1, 24, giving the Commissioners after they have qualified, and before the bankruptcy found, the necessary powers to compel the attendance and examination of witnesses and the production of books, papers, &c.

## MONKHOUSE v. THE CORPORATION OF BEDFORD.

[1810, DEC. 14.]

EQUITABLE mortgage by deposit of Deed (a).

The Court refused to suspend the execution of a Decree, obtained by a mortgagee, until six months after hearing an Appeal; but gave six months on bringing the money into Court, consenting to a Receiver, and paying Interest and Costs, on Plaintiff's undertaking to repay, if the Decree should be reversed.

Abuse of the right of Appeal prevented, not only by Costs, but also by requiring the signature of Counsel, [p. 381.]

THE Plaintiff claimed as a mortgagee in equity (1) of an estate, belonging to the Corporation of Bedford, under a deposit of the original mortgage-deed by a person, who had paid off the mortgagee; praying a Decree, that the surviving executor of the original mortgagee may assign to him; and the proper relief, as a mortgagee, entitled to call for payment or foreclosure. The Corporation disputed the Plaintiff's title, as mortgagee; insisting, \* that the person, from whom he received the deed, paying off the mortgage, intended in that transaction a gift to the Corporation; not to constitute himself a creditor. The Plaintiff having obtained the usual Decree at the Rolls as a mortgagee, a motion was made to suspend the execution of the Decree until six months after an Appeal should be heard (2).

Mr. Richards and Mr. William Agar, in support of the Motion: Sir Samuel Romilly and Mr. Bell, for the Plaintiff.

The Lord CHANCELLOR [ELDON].—A motion of this kind is of very considerable importance; as it is almost impossible upon hearing it to avoid going in a great degree into the merits of the case. The Court, guarding against any abuse of the right to re-hear, or appeal, not only with reference to costs, but farther by the pledge of Counsel, that the case is fit to be re-heard, has not that pledge in this instance. At least therefore the motion must be at the peril of costs.

The true question in this cause will be, not, whether a debt was effectually relinquished; which, attending to the doctrine of Lord Coke, it would be difficult to say could be effectually relinquished by parol, and without consideration, but whether a debt was ever effectually contracted, by the Corporation. If the real nature of this transaction was a gift to the Corporation, by a person, elected their representative, to clear their estate, without any corrupt agreement as to the past or future, which is the conclusion upon the evi-

(a) See ante, p. 369, note (a) *Ex parte Coombe*.

(1) *Ante, Ex parte Coombe*, 369; *Ex parte Langston*, 227; *Ex parte Mounfort*, vol. xiv. 606, and the references in the note; ix. 117, *Ex parte Coming*.

(2) See ante, the General Order of the House of Lords, vol. xv. 184; *Waldo v. Caley*, *Willan v. Willan*, xvi. 206, 216; and the note, ix. 316.

dence, why might they not enter into such a transaction? He proposes, under circumstances not explained, to pay a debt [\*382] \*of 9000*l.*, due by them; and upon that payment takes a receipt, in its nature equivocal; admitting either construction; that he intended to stand in the place of the mortgagee, paid off; or, as the terms rather import, that, discharging that debt, he did not mean to be a creditor in respect of it. That is open to much fair observation. If a debt was once contracted, the relief is clear: the Corporation leaving this mortgage-deed, in his hands many years, with this equivocal receipt upon it; which may mean, that the debt was transferred to that person, who deposits the deed with the Plaintiff for money lent.

I do not however say, that the Court acts as correctly, as it ought, by pronouncing upon such a motion what is equivalent to a Decree. This Decree must therefore be taken to be right, to the extent of letting execution proceed upon it; unless the Court sees that, if it should turn out to be wrong, the party cannot be set right again. With reference to that consideration what is proposed? The Court is not desired to enlarge the time for six months, and again for three months, upon the ordinary terms of paying the interest and costs: the interest having been permitted to run in arrear from 1789; which is a material circumstance: but the application is to enlarge the time until six months after hearing an appeal; not proposing any terms whatsoever, even a Receiver. It is said, the money, if paid to the Plaintiff, can never be recovered; and even the arrears of interest are a very large sum; and I admit, the magnitude of the sum, together with that circumstance of the arrears, forms a subject for consideration; and therefore the money should not be permitted to go into the Plaintiff's hands: but where is the irreparable injury from paying it into Court? It appears to me, that the Defendants ought either to do that, or go on in the ordinary course; and there is no doubt, that a Receiver must be [\*383] \*appointed. If the Defendants will pay the Plaintiff the interest due from the time of filing the Bill, and the costs, upon his undertaking to repay, if the Decree shall be reversed, and consent to the appointment of a Receiver, they may take six months from the time fixed by the Master's Report.

1. As to the general doctrines respecting *equitable mortgages*, see, *ante*, the notes to *Ex parte Coming*, 9 V. 115.

2. It is of the highest importance, that proceedings under a decree should not be stayed by an appeal, unless under special circumstances; and the signature of counsel to an appeal to the House of Lords is always understood to import their belief that the appeal is not brought merely for delay and vexation: *Way v. Foy*, 18 Ves. 453; and see note 4 to *The Canons of St Paul's v. Crickell*, 2 V. 563.

3. The acquittance of a debt must, generally speaking, be by matter of as high a nature as that by which it was created: *Wilson v. \_\_\_\_\_*, Hardr. 333; but, where securities by specialty, or record, are only the inducement, not the foundation, of action, there *nil debet* is a good plea at common law: *Warren v. Consett*, 2 Ld. Raym. 1504.

4. The time first fixed for the payment of a mortgage debt, under a bill of foreclosure, is usually enlarged: *Renvoize v. Cooper*, 1 Sim. & Stu. 365; but the in-

dulgence, though generally granted, is not of course (*Quarles v. Knight*, 8 Price, 630), and has been disapproved. When a bill is brought for redemption, the mortgagee should be ready with his money; and, in this case, no delay of payment will be allowed; and the dismissal of the bill will operate as a foreclosure; *Nosieński v. Wakefield*, 17 Ves. 418. But if a bill for redemption be dismissed for want of prosecution, such dismissal does not operate as a foreclosure, or prevent another bill from being filed for redemption: *Hansard v. Hardy*, 18 Ves. 460.

## — v. HANDCOCK.

[1810, Nov. 24; Dec. 14.]

INFANT trustee within the Statute 7 Ann. c. 19, notwithstanding an interest, as co-executor and co-residuary legatee, entitled to the mortgage money; the receipt and discharge of the other executor leaving the infant a mere trustee. Infant trustee within the Statute 7 Anne, c. 19, must be a dry trustee, [p. 384.] Conveyance by infant trustee voidable, as not within the statute: if he would be bound to convey, when adult, he would in Equity be restrained from setting it aside, [p. 384.]

UPON a reference of title an objection was taken by Mr. Hart, that the infant heir of a mortgagee could not be ordered to convey as an infant trustee under the Statute (1); having an interest in the money, as one of the residuary, legatees, after payment of debts and legacies, with another person; who was also a co-executor with him.

Sir Samuel Romilly cited two cases: *Ex parte Marshall*, and *Zouch v. Parsons* (2).

\* The Lord CHANCELLOR [ELDON].—The principle is, [\* 384] that an infant trustee within the Statute must be a dry trustee; having no interest in the subject (3). A distinction is therefore supposed to exist, between the cases of an infant, seised of a real estate, as mortgagee, the money being due upon that mortgage to another person, and where the infant is trustee of that money for himself and another; as in this instance the infant is trustee for himself and a co-executor and co-residuary legatees. I

(1) Stat. 7 Ann. c. 19.

(2) *Ex parte Marshall*, at the Rolls, June 15th, 1797.

Upon a reference to the Master, to inquire, and state, whether an infant was a trustee within the Stat. of Queen Anne, the Master reported, that the infant was the heir-at-law of the mortgagee, and was also one of his four residuary legatees, and that therefore, as the infant had an interest in the mortgage-money, he was not in the opinion of the Master a mere trustee within the meaning of the Statute: but the Master of the Rolls was of a contrary opinion; and made an Order, that the infant should convey the estate.

The same point was decided by Lord Thurlow on the 15th of March, 1783; where the heir-at-law of a mortgagee, who had died intestate, was also one of his next of kin; and would be entitled to a share of the mortgage-money, when it should be paid to the administrator. *Ex parte Carter*, 2 Dick. 609; *Ex parte Belamy*, 2 Cox, 422.

(3) *Janaway's Case*, 7 Pri. 679.

have looked at the case of *Zouch v. Parsons*; which is precisely the same; and the Court held, that, as the co-executor has a right to receive the money, and can give a discharge for it, and that payment would be good against the infant, he is a dry trustee. That is expressly stated as one ground of the judgment in that case, that the infant was an infant trustee within the Statute: but the Court said farther, that his conveyance at all events would be only voidable; and, though it is true, that, where an infant conveys as a trustee within the Statute, not being so, he will not be bound by his conveyance under such an Order, yet, if it is a case, in which he would be bound to convey, when of age, his conveyance being voidable only during his infancy, and, until avoided, passing the legal estate, and no one having a right to elect for him, whether it should be void, or not, he would, when he became adult, be placed in such a situation, that if he sought at Law to avoid his deed, a Court of Equity would prevent him. In every way therefore the title is good.

[\* 385] \* Upon reflection I think, there is great reason to support the opinion of the Master of the Rolls in the case *Ex parte Marshall*. The interest, this infant has, is as co-residuary legatee after payment of all debts, legacies, &c. with a person who is also co-executor with him. The mortgage-money, being part of the personal estate, may be paid to the co-executor. He can compel the payment; and therefore it may be paid to him voluntarily. A person, who owes money, constituting part of the residue, is well discharged by payment to one executor; who receives it in trust for himself and another; and, if the money is well paid to the co-executor, the consequence is, that this infant may be considered as a dry trustee, having no interest.

1810. Dec. 14th. Mr. Hart admitted, that this case could not be distinguished from those, cited by Sir Samuel Romilly; and

The Lord CHANCELLOR declared, that upon the best consideration his opinion was, that payment to the co-executor makes the infant a trustee within the Statute (1). —

1. SEE, ante, note 2 to *Ex parte Sergison*, 4 V. 147, as to the provision now made by statute, for conveyances by infant trustees, although they may have some beneficial interest in the subject of conveyance. The case referred to by Mr. Vesey in his note on the principal case, as having been decided by Lord Thurlow, is *Ex parte Carter*, and is reported in 2 Dick. 609.

2. It may be observed, that a conveyance made by an infant, even under the order of a court of equity, will not be valid, if the infant were not within the acts of Parliament under which infants are, in certain cases, enabled to convey: *In re Janaway*, 7 Price, 690.

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(1) See *Ex parte Tutin*, 3 Ves. & Bea, 149, as to the distinction of a lunatic trustee under the statute 4 Geo. II. c. 10; who must be without interest or duty.

## LEONARD v. ATTWELL.

[1810, Dec. 14, 21.]

BREACH of Injunction by proceeding against Bail.

THE Bill prayed an Injunction against an Action, brought in Trinity Term; in which the Plaintiff in Equity was arrested for 50*l.*, at the Defendant's suit upon a bill of Middlesex, returnable on the last day of Trinity Term, the 11th of July.

Bail was put in on the 13th of July: notice of exception to the bail was given on the 18th; but not being \*signed [\* 386] by the Attorney for the Plaintiff in the action, was irregular; and notice of justifying by the Plaintiff in Equity on the first day of Michaelmas Term. An assignment was taken of the bail bond; and on the 8th of August two actions were brought: one against one of the bail: the other against the Plaintiff in Equity. On the 5th of November the Plaintiff in Equity moved for an Injunction; and the Order was made; but, before it was served, notice was given of declaration against the Bail; upon which a Motion was made, that the Attorney for the Plaintiff at Law should be committed.

Sir *Samuel Romilly* and Mr. *Utterson*, in support of the Motion, insisted, upon the authority of *Stone v. Tuffin* (1), *Bolt v. Stanway* (2), and *Bullen v. Ovey* (3) that a proceeding at law against the bail, or the Sheriff, is to be treated as proceeding against the party; and therefore a breach of the Injunction; compelling the Plaintiff in the original action in this way to do what the Injunction was designed to prevent: to proceed to perfect bail; and a party, being present in Court, when the Order for the Injunction was made, is bound by it: *Hearn v. Tenant* (4).

Mr. *Hart* and Mr. *Wilson*, for the Defendant, contended, that under the circumstances there was no breach of the Injunction: the demand being fixed against the bail by assignment of the bond long before the Bill was filed.

1810. Dec. 21st. The Lord CHANCELLOR [ELDON] held, that upon the authorities this was a breach of the Injunction (5); but not wilful; \*and therefore not to be punished [\* 387] by commitment: but the Attorney for the Plaintiff at Law must pay the costs.

SEE note 6 to *Iveson v. Harris*, 7 V. 251.

(1) Amb. 32.

(2) 2 Anstr. 556; see as to that case, *ante*, vol. vii. 256, 7, *Iveson v. Harris*.

(3) *Ante*, vol. xvi. 141.

(4) *Ante*, vol. xiv. 136.

(5) 1 Ves. & Bea. 19. See the note, *ante*, vol. x. 452.

## GARDINER v. ——.

[1810, Dec. 21.]

NOTICE of motion by a party in *forma pauperis* must be signed by the Clerk in Court.

UPON a Motion on behalf of a pauper for the production of deeds, an objection was taken, that the Motion was not signed by a Solicitor.

Mr. Bell, in support of the objection, said, he should not press it against a pauper except from the apprehension, that such a practice would increase: the object of the rule, that Counsel and a Clerk shall be assigned, being, that some man of business shall sign the papers.

Sir Samuel Romilly, in support of the Motion, said, the distinction was, that in the Courts of King's Bench and Common Pleas, Counsel and an Attorney were assigned: in this Court, Counsel and a Clerk in Court: the Clerks in Court having formerly done the business of Solicitors in this Court.

The Lord CHANCELLOR [ELDON].—Upon that supposition the Clerk in Court ought to sign the notice. I apprehend the rule as to assigning Counsel and a Clerk in Court to a pauper is more ancient than the establishment of Solicitors in this Court: and then by analogy the Clerk in Court ought to sign the notices. I will not turn the party round in this instance; but will permit the Motion to be made; desiring however, that in future it may be understood, that such signature will be required.

SOLICITORS are modern officers of the Court of Chancery, compared with clerks in court: *Barker v. Dacie*, 6 Ves. 687; *Cowell v. Simpson*, 16 Ves. 280; and more especially see the petition *Ex parte The Six Clerks*, 3 Ves. 599. As to the remedy of a clerk in court for fees, see note 10 to *Ex parte Smith*, 5 V. 706.

## THORPE v. GOODALL (1).

[1811, JAN. 16.]

**BANKRUPT,** seized for life, with a general Power of Appointment, with remainder in default of Appointment, to the heirs of his body, cannot be compelled by Decree in Equity to execute the power for his creditors (a).  
Injunction against a bankrupt, vexatiously disputing his Commission, [p. 393.]

THE Bill, filed by the Assignees under a Commission of Bankruptcy, against the Defendant Thomas Goodall, stated indentures of settlement, executed upon the marriage of his father and mother; by which certain estates were limited to the use of the father and mother successively for their respective lives; with remainder to the use of their four children, Thomas, Michael, Johanna, and Frances, and all and every other the child and children, which they might have, during their respective lives, equally, as tenants in common; and from and after their several and respective deceases, as to the share of each and every, or any of them so dying, to the use of such person, or persons, for such estate or estates, and to or upon such uses, trusts, intents, and purposes, and under and subject to such provisoies, limitations, and agreements, and with or without power of revocation, as he, she, or they, so dying, by any deed or deeds, writing or writings, under his, her, or their, respective hands and seals, to be duly executed in the presence of, and attested by two or more credible witnesses, or by his, her, or their, last Will and Testament, signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses, should direct, limit, or appoint, give, devise, or dispose of; and, in default of such appointment, to the heirs of his, her, or their, respective body or bodies; and in case of the death of any of them, leaving no issue, to the survivors, or survivor, in the same manner, and with the same power of appointment, &c.: with the ultimate remainder to the right heirs of the father and mother respectively.

\* The Bill farther stating, that the father and mother [\* 389] died; and there were no other children, prayed, that the Defendant may be decreed to execute his power of appointment for the benefit of his creditors.

To this Bill the Defendant demurred.

Sir *Samuel Romilly* and Mr. *Cullen*, in support of the Demurrer.—The question, submitted to the Court by this Demurrer, is, that the Plaintiffs have no right to compel the Defendant to execute his power of appointment; depriving his children of that estate-tail, which is vested in them; unless he shall execute the power. As there are not in any of the Bankrupt Statutes, express words, comprehending this case, the relief can be sustained only by an equitable construction of them; and it must be admitted, that they are, as

(1) 1 Rose's Cases in Bankruptcy, 40.  
(a) 2 Maddock, Ch. Pr. 638.

is expressly declared (1) in one instance, to be liberally construed in favor of creditors: but the assignees can claim an interest in the real estate only under the bargain and sale, executed by the Commissioners; which cannot pass a benefit, to be acquired under the execution of a power; being always in the same form; expressed in the general terms of conveyance, having no reference to power. The early Statutes (2) speak of the interest, that the bankrupt has, and may depart with; not a power, which he may exercise over property; but cannot transfer. Liberal as the construction of these has been, it was never contended, that the bankrupt should do every act in his power to acquire property for the benefit of his [\* 390] creditors; that \*he could have been compelled; for instance, to levy a fine, or suffer a recovery, of his estate-tail: to convert it into an absolute interest: on the contrary though an estate-tail is expressly mentioned in the Statute of Hen. VIII. yet it passed only for the life of the bankrupt; until a subsequent Act (3) gave the Commissioners the power of selling estates, of which he was seised in tail. The assignees of a bankrupt therefore cannot compel him to do an act, to acquire himself, or give to others, an interest for the benefit of his creditors. If in this case he can be compelled to execute the power, why in the case of a limitation to him for life, with remainder to his first and other sons, in strict settlement, should he not be compelled to do an act to destroy the contingent remainders? Though in favor of creditors a defective execution of a power will be supplied, and an execution for a volunteer will be considered as assets, according to Lord Hardwicke's expression being stopped *in transitu*, the want of execution cannot be supplied: *Holmes v. Coghill* (4). In *Lord Townsend v. Windham* (5) this case is stated at the Bar; and not objected to:

"Tenant for life, with power to charge with 100l., becoming bankrupt, Lord King held, it was merely a power: not such an interest as would pass to the assignees."

The Lord CHANCELLOR [ELDON].—Is there any instance of this Court compelling a bankrupt to do any act, which he can do by virtue of either his interest or authority?

[\* 391] \* *For the Demurrer.*—There is no instance of direct compulsion. The object has been enforced in some indirect way; as by withholding the certificate, if he would not convey property in the West Indies.

Mr. Richards, Mr. Hart and Mr. Roupel, for the Plaintiffs.—The bankrupt is bound to execute for his creditors a power, which he may execute for his own benefit. The interest of the children would not be preserved by refusing this relief to the creditors. The issue have no interest, which he may not defeat; obtaining his cer-

(1) Stat. 21 Jam. I. c. 19, s. 1.

(2) Stat. 34 and 35 Hen. VIII. c. 4, s. 1; Stat. 13 Eliz. c. 7, s. 2.

(3) Stat. 21 Jam. I. c. 19, s. 12.

(4) *Ante*, vol. vii. 499; xii. 206.

(5) 2 Ves. 1; see page 3.

tificate; and executing the power, so as to bar them. The Statute of James prevents the necessity of a fine or recovery by a bankrupt tenant in tail: but raises no inference, that previously the bankrupt would not have been compelled to do the necessary acts for giving his creditors the full benefit of his interest: the effect, to which they are entitled, of his absolute dominion over the property, by whatever mode. An estate for life, with an unqualified power of appointment, amounts to absolute property; comprehending every thing (1). The case put, of contingent remainders to the first and other sons, without trustees to support them, is not parallel. This Court never orders a person to do a wrong. Does not this come within the description "any profit, possibility of profit, benefit or advantage whatsoever (2)?" There is no decision either way; that the Court will compel, or refuse to compel, the execution of a formal act for this purpose. The point is adverted to by Mr. Sudden (3). This is in truth *casus omissus* in these Acts of Parliament; \* which did not contemplate the limitation [\* 392] of a use by the execution of a power: a mode, which was not so frequent at the time of the early Acts. The Commissioners may sell offices of inheritance, and for terms of years: *Richardson's Case* (4); upon the office of Under-Marshall.

Mr. Cook (*Amicus Curiae*) said, Lord Rosslyn made such an Order, as to an office; though very much resisted in the case of a Gentleman Pensioner (5); and that Lord Alvanley had incidentally expressed an opinion, that a bankrupt could be compelled to execute such a power.

Sir Samuel Romilly, in reply.—The foundation of those cases as to offices is, that there is no other way, in which the bankrupt can deliver up that part of his property. Upon this occasion it must be taken that the assignees have not acquired the fee-simple under the Statute of King James; and that there is a power in existence; and the question is merely; whether the assignees have any equity to compel the bankrupt to execute his power. Your Lordship has frequently held in bankruptcy, that there is no jurisdiction to compel him to do an act with reference to property out of the power of the Commission; though his certificate may be withheld, until he does justice to his creditors. Suppose, after giving the relief under this Bill, the Commission should be superseded, as being invalid. He has obtained his certificate: but the case must be decided, as if the Commission was disputed.

The Lord CHANCELLOR [ELDON].—I cannot see my [\* 393] way to compel the execution of this power. If the estate of the bankrupt has passed under the assignment, so that the power is destroyed, then there is no occasion for this bill. If the transfer

(1) *Ante, Barford v. Street*, vol. xvi. 135. See the note, ii. 594.

(2) Stat. 5 Geo. II. c. 30, s. 1.

(3) Sugd. on Powers, 154.

(4) 1 Cooke's Bank. Law, 283; 8th edit. 316; 1 Montague's Bank. Law, 184, 5.

(5) *Ex parte Joynes*, 1 Cooke's Bank. Law, 283; 8th edit. 316.

of the life estate has destroyed the power, according to the reasoning of Mr. Sugden in his book, which is in many respects excellent, that, as it is a power, in a sense coupled with an interest, that interest has so passed under the assignment, that the power no longer exists, then the Plaintiffs have nothing to do here. All, that falls within those general words "possibility of profit," passes under the bargain and sale. I agree, that the statutes are to be liberally construed for the purpose of doing all, which they contemplate shall be done; but I am not authorised upon that principle to call upon the bankrupt to do an act, which they did not contemplate as to be done by him in all the transactions of his bankruptcy. After a bankrupt has repeatedly questioned the validity of his Commission, and thwarted his assignees in its progress, this Court will in due time, when his conduct appears vexatious, restrain him from farther disputing it: but the Court will not compel him to give it validity by positive act. He may perhaps be compelled by duress, as to the certificate: but, unless bound by contract, a bankrupt has never been ordered by direct decree to do any act. Is there any instance of a decree, directing a bankrupt to execute a power of leasing; though by executing it a considerable fine could be obtained? The objection has not escaped the notice of the Legislature: the late acts of insolvency actually vesting in the assignees powers which he had; of making beneficial leases, for instance. Then, is so much negative authority to be considered as nothing? If the ground of relief is, that upon principles of equity the bankrupt is to exercise his power, [\* 394] upon \* those principles the creditors have nothing to do with the power, unless the party chooses to execute it. They cannot compel him to do so. The question then is, whether the interest he has under the power, if he shall execute it, has passed: if not, whether there is any contract, that he shall execute the power; or any analogy between the case of this bankrupt, if he can be compelled to execute the power, and of a man, who may voluntarily execute, or not. The case of an office certainly deserves considerable attention: but it does not bear upon this.

If upon looking into some authorities I should adopt an opinion in favor of this Bill, I will mention it to-morrow: but my present opinion is, that this demurrer must be allowed.

#### The Demurrer was afterwards allowed (1).

1. This case is likewise reported in 1 Rose, 40, and 270.
2. It is enacted by the 77th section of the statute of 6 Geo. IV. c. 16, that all powers vested in any bankrupt, which he might legally execute for his own bene-

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(1) *Post*, 460. See the alteration of the law in this respect, 6 Geo. IV. c. 16, s. 77. In the interval between this case and the Statute the Court of King's Bench decided, that a bankrupt, at the time of his bankruptcy seised for his life, with a general Power of Appointment, and remainder, in default of appointment to himself in fee, could not execute the power: *Doe on dem. of Coleman v. Britain*, 2 Barn. & Ald, 93: but he might be compelled to execute an act, merely formal, passing no interest; as the indorsement of the transfer of a ship at sea on the Certificate of Registry after her return: *Dixon v. Ewart*, 3 Mer. 322.

fit (except the right of nomination to any vacant ecclesiastical benefice), may be executed by the assignee of his estate for the benefit of the creditors; and see, *ante*, notes 1, 3, to *Bull v. Vardy*, 1 V. 270.

3. It should seem that, under some of the older acts for the benefit of insolvent debtors, no interest passed to the assignees for the benefit of creditors, but such as was in the insolvents *at the time*; and that, when they were discharged, they were considered as certificated bankrupts: *Worrall v. Marlar*, 1 Cox, 157: but the intention of the legislature, as manifested by the latter acts of this nature, plainly has been to secure a portion of the *future* effects of the debtors for the benefit of such of their creditors as had their names inserted in the schedule: permitting execution against the property acquired by any debtor after his discharge for such sum as the court, in its discretion, should order; *Jackson v. Davison*, 4 Barn. & Ald. 695. The analogy between the insolvent and the bankrupt acts is far from being a strict one.

### HILL v. BUCKLEY.

[ROLLS.—1811, JAN. 24, 29.]

**GENERAL Rule of specific performance;** that the purchaser shall have what the Vendor can give; with an abatement out of the purchase-money for so much as the quantity falls short of the representation. Enforced against trustees for infants upon the mere mistake of their agent, without fraud, &c.: but the relief adapted to the justice of the case: viz the purchase being of wood upon a gross valuation, without regard to the quantity of land, an abatement for a deficiency of quantity, from erroneously inserting the hedges and fences, not included in the purchase, was directed with reference to land merely, not wood land (a).

THE Bill prayed the specific performance of a contract for the sale of an estate by the Defendants, devisees in trust, to \* the Plaintiff; with an abatement out of the purchase- [\* 395] money in respect of a deficiency in quantity.

The particular represented Kestle woods, part of the premises, included in the contract, as containing two hundred and seventeen acres and ten perches of statute measure; in which was included a marsh, called Gulberry marsh.

The draft of the agreement, sent by the Defendants' agent to the agent for the Plaintiff, by whom it was engrossed, described the woods as containing together with the hedges and fences thereof

(a) The general rule (for it is not universal) is, that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase-money or compensation for any deficiency in the title, quantity, quality, description, or other matters touching the estate. But if the purchaser should insist upon such a performance, the Court will grant the relief only upon his compliance with equitable terms. 2 Story, Eq. Jur. § 779. Lord Langdale says; "There is, however, a very great difficulty in all these cases, and I scarcely know, how it can be overcome; though a partial performance only, it has been somewhat incorrectly called a specific performance." *Graham v. Oliver*, 3 Beav. 124, 128; see also, *Waters v. Travis*, 9 Johns. 465.

Courts of Equity look to the substance of the contract, and do not allow small matters of variance to interfere with the manifest intention of the parties. See *ante*, note (a) *Craven v. Tickell*, 1 V. 60; note (a) *Calverley v. Williams*, 1 V. 210; note (a) *Calcraft v. Roebuck*, 1 V. 221; note (a) *Bowles v. Round*, 5 V. 508; notes (a) and (d) *Morilock v. Buller*, 10 V. 292.

two hundred and seventeen acres and ten perches, and the meadow, adjoining the said woods, called Gulberry marsh, as containing two acres and twenty-four perches.

The Bill stated, that upon perusing the draft of the contract, previous to the engrossment, the Plaintiff objected to the words "be the same *more or less*" being added to the specification of the quantity of acres; as the woods were stated in the particular to contain two hundred and seventeen acres and ten perches; and the Plaintiff and his agent had no opportunity of ascertaining the correctness of the statement: but the Plaintiff formed his judgment of the value from the particular; and therefore insisted, that such words should be omitted in the engrossment. The Plaintiff's agent, having engrossed the contract accordingly, with that alteration, transmitted it to the Defendants' agent for his signature; with a letter, stating, that he had made some alterations of no material consequence. After the contract had been returned, executed by the Defendants' agent, the Plaintiff, in the course of a treaty to sell the [\* 396] woods to another \* person had the first intimation from an estimate and measurement, shown to him of a deficiency in the quantity and by measurement, which was furnished upon application to the Defendants' agent, it plainly appears, that the statement upon which he purchased is erroneous; and instead of the woods, including Gulberry marsh, containing two hundred and seventeen acres and ten perches, they do not contain more than one hundred and ninety-one acres.

The Defendants by their answer stated, that in a map book, in the possession of their agent, containing a copy of two valuations, formerly made, the said woods, exclusive of Gulberry marsh, are stated to contain 188 acres, 1 rood, 4 perches, statute measure, and 158 acres, 25 perches, customary measure; and immediately under these numbers are the following words and figures: "Hedges, &c. 28 3 6—24 0 25; which numbers 188 1 4 & 28 3 6 together amount to 217 0 10;" that in the said map book Gulberry marsh is mentioned in a different page; stated to contain 2 acres, 24 perches; amounting together with 188 acres, 1 rood, 4 perches; to 190 acres, 1 rood, 38 perches; that the agent by mistake added the quantity of 28 acres, 3 roods, 6 perches, which is meant, (though not so stated) in the said book to express the quantity of land, occupied in hedges, ditches, and other wastes throughout the whole Barton of Newhouse, and not merely in Kestle woods, to the quantity of 188 acres 1 rood, 4 perches; suggesting, that the Defendants' agent did not know the exact quantity of acres contained in the said woods, and therefore added the words "be the same more or less:" and would not have signed the contract, if he had been aware, that it differed from the draft by omitting those [\* 397] words; of which he was not aware, when \* he signed the contract; and therefore signed by surprise.

The Defendants submitted, that, as they were trustees for infants, and their agent was not expressly authorized to sign the contract, and

signed without knowing the real quantity, they ought not to be prejudiced by his mistake ; but the contract ought either to be specifically performed without abatement, or wholly abandoned.

The Defendants' agent proved the circumstances, under which he signed the contract : being ill at Bath, he did not particularly compare it with the draft ; and was not aware, that they differed, except in a few trifling circumstances. He was not authorized by the Defendants to sign the said agreement otherwise than from his general authority, and his particular authority to accept the sum of 5550*l.* for the woods and marsh.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Wingfield*, for the Plaintiff.—The Plaintiff is clearly entitled to a specific performance of the contract, with an indemnity out of the purchase-money for the difference between the estate, to be conveyed to him, and that, for which he contracted. The representation of the quantity gives a minute specification ; descending to rods, and even to perches : and it cannot be seriously represented, that a difference, amounting to nearly thirty acres, could be covered by the words “be the same more or less ;” upon which words the Court places no reliance : *Neale v. Parkyn* (1). This case is not attended with any of those circumstances, under which a Court of Equity would refuse to interfere, \*upon the principle of *Morilock v. Buller* (2), [\* 398] that all the advantage, that ought to have been made for the *cestuis que trust*, was not made.

Mr. *Leach* and Mr. *Shadwell*, for the Defendant.—The Defendant does not contend, that the quantity of land, which is the subject of this dispute, could be included under the words, “ be the same more or less : ” but the ground, upon which this Court will refuse to aid the Plaintiff, is the admitted mistake of the agent, adding the quantity, comprised in the hedges and fences of the whole estate, to that part, which is the subject of the contract. The letter of the Defendants' agent shows, that he was under the impression of that mistake ; and, referring to two valuations of the woods, amounts to a plain declaration, that he was proceeding, not upon a calculation per acre, but upon actual valuations, made at the two periods stated. The Plaintiff must contend, that he, who was in the daily habit of seeing these woods, calculated their value to him upon a certain computation per acre, as containing two hundred and seventeen acres. The Plaintiff's agent erasing these words, which his client considered so important, did not communicate that ; merely saying, that he would find two or three trifling alterations, of no importance ; and the Defendants' agent swears, that he signed the contract, not being aware of that alteration.

What then is the principle of equity, to be applied to such circumstances ? The Plaintiff calls upon a Court of Equity to give him the

(1) 1 Esp. N. P. Cas. 229.

(2) *Ante*, vol. x. 292; see 305, and the note.

benefit, arising from the ignorance and mistake of the Defendants' agent. A Court of Equity will not cancel an agreement [\* 399] without fraud: nor assist a \* demand, plainly unconscientious; as this must be from the Plaintiff's knowledge of the mistake; and that the Defendant did not mean to guarantee the quantity of two hundred and seventeen acres; proceeding upon the notion, that in value there was only one hundred and eighty-eight; supposing the rest to be occupied in the fences. This relief, beyond the law, is given only upon equitable principles, against a Defendant, refusing to do what he is in conscience bound to do. Here the Court sees that this quantity was inserted by mere mistake; and that the Plaintiff is demanding that, which he knows was not intended by the party, with whom he was dealing. In such a case a Court of Equity would even interpose against a legal remedy; and much more would refuse to assist the unconscientious claim.

In *Mason v. Armitage* (1), the last case of that kind, under circumstances much more slight, Lord Erskine would not assist the Plaintiff, taking advantage of the mistake of an agent.

The Defendants being trustees for minors, upon the principle, established in *Mortlock v. Boller*, this claim cannot be sustained to the prejudice of the *cestuis que trust*. The proposition, there stated by the Lord Chancellor, is, that, even taking the authority to have been sufficient, the Court would not decree a specific performance of a contract, which would have been a great injury to the *cestuis que trust*; that a Court of Equity will not by enforcing the execution of a contract, violate interests which it is bound to protect; and the principle is too clear to require the aid of authority. The purchaser from trustees for infants, asking compensation for the mistake of an agent, over-rating the quantity, is met by the principle, "*caveat emptor.*"

[\* 400] \* Another objection to the execution of this contract, if the case required it, is, that this agent was limited to a particular price. Considering him as having authority to sell at not less than 5250*l.*, contracting for less he contracts without authority; and the contract shall not be enforced.

Sir *Samuel Romilly*, in reply.—It cannot be contended, that the purchaser is bound to see, that the contract is advantageous to the infants; but the circumstances do not raise an objection of that nature. This is merely the common case of a sale upon a misrepresentation; and though it may have proceeded from mere mistake, with no design to deceive, the representation must be made good to the purchaser: or he must have a reduction of the price. The cause of the mistake is of no consequence to him. The proposition, that the Defendant's agent did not mean to sell two hundred and seventeen acres, is a fallacy. He did mean to sell that quantity: conceiving that to be the amount by the addition of so many acres of fences

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(1) *Ante*, vol. xiii. 25; see the notes, v. 734, 849; *Culverley v. Williams*, *Calcraft v. Roebeck*, i. 210, 221, and the note, 226.

and hedges, proceeding from mistake ; the effect of which is, that he undertook to sell a much greater quantity than he had. Upon that alone the Plaintiff must succeed ; even if these words "be the same more or less" had stood part of this contract ; which words would have been very important, if there had been a deficiency of two or three acres ; for which reason the Plaintiff was anxious, that they should be struck out : but under the actual circumstances they would have been perfectly immaterial ; and the objection on that ground is properly waived. The question is no more than this ; whether the Plaintiff is to pay the full price for less than the whole of his purchase ; without misrepresentation, or advantage taken by him.

\* 1811. Jan. 29th. The MASTER OF THE ROLLS [Sir [\* 401] WILLIAM GRANT].—The facts of this case are very few ; and there is very little controversy upon them. In the particular, which was sent by the Defendant's agent to the Plaintiff's, which is the basis of the subsequent negotiation, the woods, called the Kestle Woods, including the Gulberry Marsh, were represented as containing two hundred and seventeen acres and ten perches. In fact there was not that quantity by about twenty-six acres. No deception was intended. The Defendant's agent fell into a mistake ; the nature and cause of which now distinctly appear : but I do not think myself warranted by any evidence in the cause to infer, that the Plaintiff knew the real quantity. A very intimate acquaintance with the premises would not necessarily imply knowledge of their exact contents ; while the particularity of the statement, descending to perches, would naturally convey the notion of actual admeasurement. Where a misrepresentation is made as to the quantity, though innocently, I apprehend, the right of the purchaser to be to have what the vendor can give ; with an abatement out of the purchase-money for so much as the quantity falls short of the representation. That is the rule generally ; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price regard was had on both sides to the quantity, which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain : therefore a rateable abatement of price will probably leave both in nearly the same relative situation, in which they would have stood, if the true quantity had been originally known ; and I do not think, I could upon any principle in the case of *Mortlock v. Boller*, to which this bears no resemblance, exempt these \* Defendants [\* 402] from this equity upon the ground of their being trustees, and not owners.

But there is a difficulty in this case from the nature of the mistake ; which must have influenced the vendors in their estimate of the price in a manner, that, if a rateable abatement were now to be decreed, would be extremely disadvantageous to them ; for though they believed, they had two hundred and seventeen acres to give to

the purchaser, and must be supposed to have asked a price in proportion, yet they did not believe, that it was all woodland. They imagined, that twenty-eight acres consisted only of hedges and fences, and other waste. They could not certainly set the same value upon that, though perhaps it was considered of some value, as upon land, covered with wood of mature growth: therefore, by a rateable abatement from the purchase-money it is clear they must allow to the purchaser much more than they would have received from him; and consequently they would be compelled to accept less than it was ever in their contemplation to take. That is not all. The purchaser also would obtain a better bargain than he ever had in his contemplation. He was in the course of the negotiation furnished with the value of the woods, *qua* wood, as ascertained in the year 1805. The value being given, it was immaterial, in that respect, whether the woods were spread over a greater or less number of acres. The valuation had no reference to the quantity of ground. All the wood upon the estate was comprehended; and it was represented to the purchaser, that what he was to get was wood, which in 1805, was of the value of 3500*l.* He has got all the wood, upon which that value was set. Is he entitled, also, to the value of twenty-six additional acres of wood; which he would have in effect by an abatement, made to him

[\* 403] out of the purchase-money upon the proportion merely of quantity and price. The wood would have been no more valuable to him, if in fact it had occupied two hundred and seventeen acres, instead of one hundred and eighty-eight; nor would he have paid a shilling more for it; as the price of the wood was not fixed with reference to the ground, which it covered. Therefore it is only in the price of the soil, and not in the price of the wood, that the purchaser could be injured by the mistake of the vendor: the particular representing the wood as occupying two hundred and seventeen acres: the purchaser has the right quantity of wood; but not of soil. He is therefore entitled to some abatement; as they gave him reason to believe, that he was to obtain two hundred and seventeen acres of soil; but the abatement is to be only so much as soil, covered with wood, would be worth, after deducting the value of the wood; and with an abatement, to be ascertained upon that principle, the agreement ought to be carried into execution.

See note 5 to *Cooper v. Denne*, 1 V. 565; note 8 to *The Marquis of Townshend v. Stangroom*, 6 V. 328; and the notes to *Drew v. Hanson*, 6 V. 675 with the further references there given.

HAMPER, *Ex parte.*

[1811, FEB. 4, 6.]

**DISTINCTION** as to partners; with reference to third persons, and as between the partners themselves (a).

Partners as to third persons by specific Interest in the profits, as such: not by receiving a sum of money, even in proportion to a given share of the profits (b).

Dormant partner by a share of the profits: but the property by agreement belonging exclusively to the other: Joint commission not supported; as the joint property would not be liable to Execution under an action against the dormant partner.

Objection to a joint Commission, that under a separate Commission the Certificate had been obtained; and lay before the Lord Chancellor for allowance.

Execution by a separate creditor against joint property; subject to account; ascertaining the specific interest of the partner in the joint effects (c).

Commission of Bankruptcy an action and execution in the first instance.

Dormant partner, not an ostensible contracting party: a creditor may, but is not bound to, go against him (d).

Separate execution under joint judgment.

Execution against joint property; though the foundation of the Action had no relation to the joint concern.

(a) "Partnership as to third persons" forms an important chapter in Mr. Justice Story's work. Story, Partner, ch. 4, § 30 to § 70.

(b) The test of partnership is a community of profit, a specific interest in the profits, *as profits*, in contradistinction to a stipulated portion of the profits *as a compensation for services*. *Loomis v. Marshall*, 12 Com. 69; *Champion v. Bostwick*, 18 Wendell, 175; *Vandenburgh v. Hull*, 20 ib. 70; *Thompson v. Snow*, 4 Greenl. 264. Mr. Justice Story considers that a share in the *net*, and not in the *gross profits*, is here meant to constitute a partner. Story, Partner, § 34; see also, *Bond v. Pittard*, 3 Mees. & Welsh. 357; *Cutter v. Winsor*, 6 Pick. 335; *Bailey v. Clark*, 6 Pick. 372; *Turner v. Bissell*, 14 Pick. 193; *Chase v. Barrett*, 4 Paige, 148, 159.

There are special cases in which a person may be allowed to receive part of the profits of a business without becoming a legal or responsible partner; as where seamen take a share by agreement with the ship-owner in the profits of a whale fishery or coasting voyage, by way of compensation for their services. 3 Kent, Com. (5th ed.) 33, 34; *Hazard v. Hazard*, 1 Story, R. 371; *Muzzy v. Whitney*, 10 Johns. 226; *Rice v. Austin*, 17 Mass. 206; *Lowry v. Brooks*, 2 McCord, 421; *Baxter v. Rodman*, 3 Pick. 435; *Cutter v. Winsor*, 6 Pick. 335; *Hardin v. Foxcroft*, 6 Greenl. 76.

It is admitted by Mr. Justice Story, that a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances; but, he adds, if the participation in the profits can be clearly shown to be in the character of agent, then the presumption of partnership is repelled. Story, Partner, § 38 to 48, where the authorities are carefully considered. See also, *Champion v. Bostwick*, 18 Wend. 175; *Perrine v. Hankerson*, 6 Halst. 2, 181.

(c) The partnership property may be taken in execution upon a separate judgment against one partner, but the sheriff can only seize and sell the interest and right of the partner therein, subject to the prior rights and liens of the other partners, and the joint creditors therein. For the illustration of this principle, and the authorities, see *ante*, note (b) *Hankey v. Garrott*, 1 V. 239; note (b) *Taylor v. Fields*, 4 V. 396; *Moody v. Payne*, 2 Johns. Ch. 548; Story, Partner, § 263.

(d) Dormant partners, when discovered, are equally liable, as if their names had appeared in the firm, although they were unknown to be partners at the time of the creation of the debt. 3 Kent, Com. (5th ed.) 31; *Pitts v. Waugh*, 4 Mass. 424; *Binney v. U. S. Bank*, 5 Peters, 529, 561.

It is in the option of a firm, suing as Plaintiffs, either to join the dormant partner in the suit or omit him; as in the corresponding case of the firm being sued as de-

SEPARATE Commissions of Bankruptcy had issued against Rogers and Thomas; and Thomas had obtained his certificate; which lay before the Lord Chancellor for allowance. A joint Commission afterwards issued; and the joint creditors, with the view to [\* 404] supersede the separate Commissions, presented a petition to stay the certificate. The Petition was opposed by Thomas; on the ground, that the joint Commission could not be supported; upon affidavits; denying, that there was any partnership; or any joint property: the goods, consigned to Thomas at Cadiz, having been originally purchased by Rogers, by bills, drawn by him.

The Lord CHANCELLOR [ELDON].—The question, whether the joint Commission can be supported, turns upon two or three circumstances: first, whether Thomas and Rogers were partners: not upon the present state of the agreement between them; as they may clearly agree, that all the property, which is the subject of that agreement, shall be the property of one exclusively; but that the other shall participate in the profit, arising from it. The cases have gone farther to this nicety; upon a distinction so thin, that I cannot state it as established upon due consideration; that, if a trader agrees to pay another person for his labor in the concern a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner: but, if he has a specific interest in the profits themselves, as profits, he is a partner (1).

Another consideration is as to the consequence of that with regard to third persons; whether he is a partner for the purpose of enabling a creditor, who thinks proper to sue him, to take the property in execution; and whether those creditors, who do not choose to consider him a partner, would be bound. Suppose two persons concerned in a cargo in this manner; the whole being the property [\* 405] of one: but a profit out of the proceeds to go \* to the other: it would be extremely difficult to maintain, that the creditors of the latter could take in execution a moiety of that cargo;

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fendants, it is at the option of the plaintiff to join the dormant partner or not; and the joinder or non-joinder will not constitute any objection to the maintenance of the suit. *Story, Partner*, § 241; *Skinner v. Stocks*, 4 B. & Ald. 437; *Lloyd v. Archbowle*, 2 Taunt. 324; *Brassington v. Ault*, 2 Bing. 177; *Wilson v. Wallace*, 8 S. & Rawle, 55; *Clarkson v. Carter*, 3 Cowen, 85; *Boardman v. Keeler*, 2 Vermont, 65; *Lord v. Baldwin*, 6 Pick. 348; *Alexander v. Barker*, 2 Crompt. & J. 133; *Cothay v. Fennell*, 10 B. & C. 671. It is said by Mr. Justice Story, that the authorities are not exactly agreed upon the point, where the dormant partner is a party plaintiff; but they all agree as to the point, where such partner is a party defendant. It is difficult to state any reasonable distinction between the cases. *Story, Partner*, § 241, note.

If one partner borrows money in his individual name, a dormant partner is equally liable if the borrower represented it to be for the use of the partnership, though without such a representation, the creditor must prove that the money went to a partnership use. *Etheridge v. Binney*, 9 Pick. 272; *Lloyd v. Ashby*, 2 Carr. & P. 138.

(1) *Ante, Ex parte Benfield*, vol. v. 424; *Post, Ex parte Langdale*, xviii. 301; *Ex parte Hodgkinson, Ex parte Norfolk, Ex parte Watson*, xix. 291, 455, 9; *Ex parte Matthews*, 3 Ves. & Bea. 125; *Smith v. Watson*, 2 Barn & Cress. 401.

subject to the account, which we hear of in these cases. If two persons openly carry on trade in partnership, another, who gives them credit, not knowing, that there is a dormant partner, may bring an action against either of the apparent partners; and may have execution against the interest of that one in the joint effects: but is there any instance of an execution against the visible effects of the visible partners under an action against the dormant partner?

To illustrate this: in the case of *Lane, Fraser, and Boylston* (1),

(1) 11th May, 1793. *Ex parte HOLMES*. Joint Commission of bankruptcy against Lane, Fraser, and Boylston, 20th April, 1793. Merchants and co-partners, carrying on trade under the firm of Lane, Son, and Fraser.

Boylston's Solicitor attended by Counsel at the meeting to open the Commission, to oppose it.\* He was found bankrupt at seven o'clock in the evening.

22d April, 1793, a separate Commission, on the Petition of George Marsh, was sealed against Boylston. Under this he was found bankrupt, notwithstanding the Commissioners had notice of the former declaration of bankruptcy.

This Petition prayed to supersede the separate Commission.

*Ex parte MARSH*. Petition; insisting, that Boylston never was a partner with Lane and Fraser; that, if he was a partner, there was not a sufficient debt due from Lane, Fraser, and Boylston, to Holmes, to support the joint Commission; and praying an issue, or an inquiry; to try whether Lane, Fraser, and Boylston, were indebted to Holmes in 100*l.* or upwards; and, in case it should be found against the debt, that the joint Commission might be superseded.

*Ex parte BOYLSTON*. Petition by Boylston; stating the agreement of 1781; that it was rescinded in 1786; that he had never since had any of the profits of the trade; and that the debt of Holmes or any other of the joint creditors was not contracted prior to April, 1786, or in respect of such part of the dealings of the house, in which the Petitioner had any concern; and praying an issue at Law to try the debt, and, if found against the debt, to supersede the Commission.

The Order directed a trial at law in the Court of King's Bench upon two issues.

1st, Whether any and what debt was due jointly from Lane, Fraser, and Boylston, to John Holmes, at the time of suing out the Commission.

2dly, Whether Boylston was at any time, and when, and for what length of time, and in what business, a partner with Lane and Fraser: all parties to produce books, &c. under the joint Commission; and Boylston to be examined *viva voce* before the Commissioners upon matter, arising in the course of, and in consequence of, such production.

Deed, 30th Aug. 1784, by Lane and Fraser:

In consideration of 40,000*l.* lent and deposited with us by Boylston, carrying interest at 5 per cent per annum, for receipt of which we have given him our two bonds for the term of ten years, and we promise and pledge ourselves to unite to the 40,000*l.* lent as aforesaid by Boylston, 80,000*l.*; making a capital of 120,000*l.* all which to be improved by us Lane and Fraser, in a line of commerce and business as partners; the same as was followed and pursued by us under the firm of Lane, Son, and Fraser; and we do hereby promise to pay to Boylston annually the full amount of one third of the Commission (exempt and free of any charge or expense thereon) which should annually arise in transacting the business of the aforesaid Company, of whatsoever kind of Commissions they may be, and for this purpose, we agree, that an account of Commission should be adjusted and made up, &c.; and the said one third of the Commissions should annually amount to 3000*l.* We farther agree, that Boylston is not responsible for any debts, dues, or demands, contracted by us: nor to be charged or accountable for any losses.

In April, 1786, Boylston, Lane, and Fraser, came to a new agreement; that the

\* This is not generally permitted.

great difficulty arose upon the fact, as I believe it was, that Boylston's interest was only an usurious contract for a share of [\* 407] profits, greatly exceeding \* the legal interest of the sum he had lent to the concern. Suppose, they had remained solvent: an individual creditor of either Lane or Fraser, bringing an action, and getting execution, might undoubtedly have laid hold of the effects at law; subject to the account, ascertaining the specific interest in the joint effects (1); but, if a creditor of Boylston had obtained a judgment in an action against him, how could such a creditor have gone against the effects of Lane and Fraser? I have no notion that a creditor of Boylston could under a judgment against him have laid hold of any thing in the partnership: Boylston's interest, with regard to his money, not being as a part of the [\* 408] capital: but that sum being there merely as a \*loan of money, with a contract for usurious interest to him by a share of the profits.

The question then will be, whether a Commission of bankruptcy, which is said to be, not accurately, but in some degree an action and execution in the first instance, is to vary the rights of creditors; and make a fund, which previously was the property of one, the property of both. That forms a new question: if the fact should be, that the property belongs to one, or two, exclusively; whether a creditor can by taking out a Commission, instead of bringing an action, make that the property of the co-partner, or of all, as against the other partner or partners. I do not recollect, that this question was decided in *Boylston's Case*, or any other.

Let this Petition stand over; that we may see what passed in *Boylston's Case* (2); and that affidavits may be made upon the fact, whether there is any joint property. If there is not, I think, this question must be put in a shape for decision by a Court of Law.

1811. Feb. 6th. Mr. Hart and Mr. Cooke, in support of the Petition.—The objection to this Petition is, that Thomas was not a partner farther than as to personal liability to third persons; but as there is no partnership stock, there can be no joint Commission. That has never been determined. In *Boylston's Case* there was a joint Commission against the three, taken out by a creditor of Lane

former agreement from the 15th of April, 1786, should be null and void; and Boylston acquires, resigns, and gives up his claim to said one third or share in the Commissions; and Lane and Fraser agree to refund or pay to Boylston the sum, deposited by him; and for security and due payment of which they had given him their bonds, dated the 30th of August, 1784.

Boylston, in his Petition, insisted, that, since the 15th of April, 1786, he had not received any share of the profits; but Holmes swore to information and belief, that Boylston received the 2000*l.* a year interest, and the 3000*l.* Commission as before.

(1) *Hankey v. Garratt, ante*, vol. i. 236, and the note, 239.

(2) In *Ex parte Norfolk*, the Lord Chancellor says, he believes that case was settled by agreement; *post*, vol. xix. 457.

and Fraser on the 20th of April, 1793; and on the 22d a separate Commission was taken out against Boylston. Three Petitions were presented; one to supersede the \* separate [<sup>\* 409</sup>] Commission; the others to supersede the joint Commission. The Order directed an issue: first, whether any and what debt was due from the three jointly to the petitioning creditor under the joint Commission: secondly, whether Boylston was a partner; and in what business. He was found to be a partner in the Commission business: the separate Commission was therefore superseded: the joint Commission, having been resisted by Boylston to the utmost, was established; and he obtained his certificate under it. This question did not arise in that case. The difficulty was, that Boylston's property was principally in America; and the assignees could not get at it; as he chose to remain in prison rather than give it up.

In *Benfield's Case* (1) he applied to supersede the joint Commission on the ground, that there was a secret partner: a house in France. Lord Loughborough refused to supersede the Commission; conceiving, that, though they might go against the sleeping partner, they were not bound to take that course.

Any creditor, who can establish, that these parties have conducted themselves so, that he has a right to consider them as partners, may take out a joint Commission; and by that mode reach the surplus effects of each. When it is once established, that the petitioning creditor has a right to consider them as partners, the consequence must follow: and he has as much right to take out a Commission as to bring an action. There can be no doubt of the right of these creditors to go in, and assent to, or dissent from, the certificate; which would follow the right to sue at law; depending on the fact, that Thomas was, as well as Rogers, to participate in the profits. \* The goods were purchased in the name of Rogers [<sup>\* 410</sup>] by bills drawn by him: but it is clear upon the affidavits, that these goods, so purchased by Rogers, were to be consigned to Thomas, at Cadiz; who by agreement was, either directly, or under the name of commission, to participate in the profits; only a particular parcel of goods was to be on the sole account of Rogers. Can a man, describing himself in the correspondence as a partner, "the friend, correspondent, and partner," on another occasion, saying, "we shall be the first house, &c." be heard to state by affidavit, that he was not a partner? So Boylston swore positively that he had not received a share of the profits from 1786, when the former agreement was annulled: but a letter was proved, dictated by himself, by which Lane and Fraser state, that, notwithstanding that agreement was annulled, they held themselves bound in honor to continue to him in effect that share and interest, contracted for; and upon that agreement to continue Boylston's interest, appearing by

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(1) *Ex parte Benfield, ante, vol. v. 424.*

that letter, dictated by him, the partnership was established by the verdict, under Lord Kenyon's direction.

This case is precisely the same. Thomas could not before a Jury contradict his own letters. An issue should be directed to try, whether Thomas and Rogers were jointly interested in the goods, purchased in the name of Rogers. At least the certificate should not be allowed without giving an opportunity to the joint creditors of assenting or dissenting.

Sir *Samuel Romilly* and Mr. *Rouppell*, for the bankrupt Thomas.—The object of a joint Commission is to distribute the joint property ; and, where there is joint property, a joint Commission [\* 411] is supported ; in many cases at the expense of the separate creditors ; who cannot do certain acts under it ; for instance, vote in the choice of assignees ; but, as there is a joint fund to act upon, a joint Commission is supported : without inquiring, whether the joint or the separate fund is the largest. If, generally, a joint Commission can be maintained, where there is no joint property, it clearly cannot in this case : there being two separate Commissions subsisting.

Upon these letters a jury would say, these persons were partners to a certain intent : *i. e.* that they were to share in the profits : but not to the effect of making this joint property. Thomas, using the expressions, "friend, correspondent, and partner," is speaking of the different relations, in which they had stood ; not meaning all to apply to that moment ; and the description of himself, as partner, means no more than at that moment he was entitled to a share of the profits. In a subsequent letter he says, he is to be a partner "now that all is safe ;" meaning, that he was to participate in profit, but not to be charged with loss. There is no foundation therefore in the circumstances either to supersede the separate Commission ; or to permit these creditors, not being creditors of Thomas, to come in, to assent to, or dissent from, the certificate.

The Lord CHANCELLOR [ELDON].—If there is joint property, that puts an end to all difficulty ; if there is not, after all, that I have heard, I have great doubt as to supporting a joint Commission against a dormant and an active partner : a question, which has never been decided. It is clear, that a man may not be a partner, as between himself and another ; though he must be so considered [\* 412] with reference to third persons : \* but was it ever decided, that on that ground, that he is a partner as to third persons, he has a property in the effects of the partnership ? In *Boylston's Case* this objection, according to my recollection, was not taken : nor did the issues directed touch it ; though going to the point, whether Boylston was a partner, not bringing forward the question, whether he had any property in the partnership. When they came to distribute the effects, they found a difficulty ; and it was finally arranged by agreement with Boylston.

In the case of *Lodge and Fendall* (1) the dormant partner had a property in the effects. In *Benfield's Case* (2) the creditor was creditor of Boyd and Benfield; and could not, unless by his own consent, be made a creditor of the French house: the law upon that being clear: that, the dormant partner not being an ostensible contracting party, the creditor, though he may, if he chooses, is not bound to go against him.

Some points in this case are clear. Thomas is clearly a partner as to third persons; whether as between him and Rogers, is a very different consideration. The ground as to third persons is this. It is clearly settled, though I regret it, that, if a man stipulates, that, as the reward of his labor, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner: but, if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner; and in a question with third persons no stipulation can protect him from loss. Upon \* the memo- [\*413] randum therefore and the letters in this case there is no doubt, that Thomas would be liable.

Suppose judgment obtained against both: upon which execution might be had against either: if execution was taken against Thomas, who had no property in the effects, I do not see, how the creditor at Law could under that execution, touch the effects, being in that view the effects of Rogers. If, on the other hand, Thomas had been a partner in the property, though the foundation of the action had no relation to the joint concern, the Plaintiff might have execution against the goods of Thomas. If there was no joint property, and a Commission of bankruptcy may be considered as an action and execution in the first instance, one question, and a question of difficulty, is, whether a joint Commission can be supported against persons, who have no joint property, whether, as that person has the right against two, both liable, as partners, his individual choice shall compel all the other creditors, who might have gone against Rogers alone, having the property, to acquiesce in that mode of distribution; though perhaps no one would make that choice. The case is very different certainly, if there are joint effects: but, taking this to have been originally the property of Rogers alone, I am not satisfied, that there is joint property, from particular instances, in which they might have dealt with particular effects, which are gone, and the money spent; no joint property being left; or joint debts for property, sold upon the joint account; which also would be joint effects; the result of which particular transactions, occurring in their general dealings.

Another consideration is, whether, after a Certificate obtained by

(1) Stated *ante*, vol. ix. 589.

(2) *Ex parte Benfield, ante*, vol. v. 424.

the bankrupt under a separate Commission, that Commission can be superseded on the ground, that there is a joint Commission, [\* 414] \* capable of being sustained. It seems to be rather a harsh, and a new proceeding : superseding a Commission ; under which the bankrupt has obtained his certificate, though not allowed. I should deprive him of his certificate ; though perhaps he might not have the opportunity of obtaining another ; if the joint Commission should not be prosecuted. The case requires great consideration, before I supersede a separate Commission at the instance of persons, who may support a joint Commission, when the Certificate lies before me (1).

1. THE manager of a partnership concern having a salary, and also receiving a share of the profits, calculated according to a certain proportion of the capital and stock employed in the business, though no part of the capital was advanced by him (such proportion being assumed only for the purpose of making an addition to his salary, and rendering the amount of that addition contingent upon the skill and success of his management), is, unquestionably, a responsible partner as to all the creditors of the firm, of which he is an *ostensible* partner, and in the dealings of which firm with others he has acted as a partner ; but, as between himself and the copartners, he is not subject, in account with them, to losses sustained by the partnership, farther than as such losses reduce or annihilate his claim to a share of profits beyond his salary : *Geddes v. Wallace*, 2 Bligh, 296. The difference between a nominal partner and a dormant partner is this : the latter is liable in respect of the profits to which he would have a claim if the business were successful ; the former (or the nominal partner) is responsible in consequence of allowing his name to appear as one of the firm : when he holds himself out as one of the persons by and to whom things are bought and sold, it is immaterial whether he is interested in the capital employed in the trade, or whether he receives a certain fixed salary, or one charged upon and in proportion to the profits, without any property in the stock or capital, or, finally, whether, without any participation whatever in the profits, he has, by lending his name, given a decisive appearance of substance to the concern ; in either case he is, as to third persons, responsible as a partner : *Ex parte Watson*, 19 Ves. 461 ; *Ex parte Jackson*, 1 Ves. Jun. 132 ; *Smith v. Watson*, 2 Barn. & Cress. 182 ; *Ex parte Langdale*, 18 Ves. 301.

2. The 16th section of the stat. of 6 Geo. IV. c. 16, renders it no longer necessary to include every avowed (much less every dormant) partner in a joint commission against others of the same firm ; and, indeed, before the act cited was passed, Lord Eldon had declared, that, although a court of common law had recently determined, when an action was brought against the only known and visible debtor, he might plead in abatement, that he had a dormant partner equally liable to the demand (and see *Ex parte Benfield*, 5 Ves. 426) ; yet he, the Lord Chancellor, would never disturb the decisions which, in a long course of administering the jurisdiction in bankruptcy, have stated the acknowledged law of the country to be, that a man dealing with A. is not compelled to take B. as his debtor, whom he never heard of : *Ex parte Hodgkinson*, 19 Ves. 294 ; *Ex parte Norfolk*, 19 Ves. 458. It is quite clear, however, that a creditor may, if he choose, go against a dormant partner, though he is not bound to take notice of one who is not an *ostensible* contracting party : *Ex parte Mathews*, 3 Ves. & Bea. 126 ; *Ex parte Layton*, 6 V. 438.

3. As to the due application of joint and of separate estate to the discharge of joint or separate debts, and in what qualified sense only a commission of bankruptcy is in the nature of an execution at common law, see, *ante*, notes 3, 4, to *Hankey v. Garrett*, 1 V. 236 ; note 5 to *Lyster v. Dolland*, 1 V. 431 ; and note 3 to *Ex parte Brown*, 2 V. 67.

4. The 16th and 17th sections of the statute of 6 Geo. IV. c. 16, provide against the hardship pointed out in the principal case, which might, previously to the act,

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(1) *Ex parte Tobin*, 1 Ves. & Bea. 308.

have been suffered by a bankrupt, against whom a separate commission had been proceeded with, till he had obtained his certificate from the requisite number of creditors and the commissioners, though it was not actually allowed by the Lord Chancellor; and then a joint commission was taken out, to make room for which it was necessary to supersede the separate commission.

**FOSTER, Ex parte (1).**

[1810, FEB. 6, 7.]

**ADVERTISEMENT** of bankruptcy in the Gazette suspended; but only on the ground, that there was not a sufficient act of bankruptcy on the proceedings: namely a denial to a creditor, with subsequent approbation; but the time not ascertained; nor connected with the previous direction, ten months before the Commission. A farther Affidavit was required; upon which the Commission was superseded. Ground of the General Order, that the petitioning creditor shall attend in person at the opening a Commission of Bankruptcy, [p. 415.] Useful, that the existence of the petitioning creditor's debt at the time of the bankruptcy should appear on the deposition, [p. 415.] Denial to a creditor, with subsequent approbation, if not connected with previous direction, or if in the interval the debtor had seen, and conversed with, the creditor, not an act of bankruptcy, [p. 416.]

This Petition was presented by a Bankrupt, before the insertion in the Gazette of the adjudication by the Commissioners; praying, that the Commission should be superseded; and the insertion of the adjudication in the Gazette stayed.

The Petition was supported by affidavits; stating, that there was no act of bankruptcy; and alleging, that the Commission was taken out from malicious motives; and that the petitioner is solvent; and is ready to pay his debt to the petitioning creditors, if they will furnish a proper account.

\* The Lord CHANCELLOR [ELDON].—When this petition [\* 415] was opened, it struck me, that my interposition between the adjudication of the Commissioners and the advertisement in the Gazette would be a very delicate step; and, if on looking into the proceedings, I had found the adjudication supported by clear evidence, I would not have interposed: whatever might be the nature of the case: but on reading the deposition as to the act of bankruptcy I think, I take a step in no degree mischievous by requiring the affidavit I proposed; as there is not enough upon the proceedings to warrant the adjudication. I will explain what I mean by that. Lord Rosslyn's rule (2), requiring the petitioning creditor's attendance in person upon the opening the Commission, is, I conceive, founded upon this; that it is extremely useful in the commencement of the proceeding to record evidence, which will in all stages be sufficient to support the Commission.

There is no doubt as to the trading in this case. The petitioning

(1) 1 Rose's Bankrupt Case, 49.

(2) General Order, 26th November, 1798.

creditor's debt is sworn to according to the usual custom, as being due at the time of the Commission issuing; and, if the act of bankruptcy had been recent, I should not have been called upon to examine with the same accuracy the question, whether that debt was antecedent to the bankruptcy; though I must observe, that it would be eminently useful, that this fact also should be made to appear upon the deposition: but, there appearing to be a debt of a fluctuating nature, the Commission issued in January; and the act of bankruptcy was in March, nearly ten months before. I ought therefore to be quite satisfied, that there is a clear act of bankruptcy [\* 416] proved; \* and on that ground I thought, some information might with propriety be called for as to that debt, sworn to be due at the date of the Commission.

It is clear, that no act of bankruptcy has been proved by deposition. The witness, whom I cannot consider as swearing falsely merely on the ground, that he is a discharged porter, swears, that in March last he received the bankrupt's direction to deny him; ascertaining the time, when that direction was given; but pointing to no time, when it was obeyed. Under those circumstances the suspicion is not unjudicial, that there is a difficulty in fixing the time, when that direction was obeyed; which might be expected as to the month, at least, if not the day; and the omission is the more extraordinary, as he mentions the creditor, who did call; who could therefore confirm him; so as to ascertain, whether the call could be so connected with the direction as to make an act of bankruptcy. It is true, the witness states, according to the usual course of the deposition, that he mentioned the denial to his master; who approved it: and that is very important evidence to go to a jury: but, if it turns out, that the denial cannot be connected with the direction, the subsequent approbation of it will not make it an act of bankruptcy; and, if in the interval the debtor had seen, and conversed with, these creditors, the subsequent denial would not be an act of bankruptcy.

In strictness, the bankruptcy not being proved, it might perhaps be insisted, that I should supersede the Commission; and let them take out another: but I have a discretion to take a different course; if no fair objection to it can be stated. According to the constant course, when a question of this kind is sent to a jury, to require the

[\* 417] parties to give notice, what is the act of bankruptcy they mean \* to prove, I think, this Petitioner has a clear right to insist on their laying before me by affidavit, what is the act of bankruptcy; and no mischief can arise from it: as I desire it to be fully understood, that, if there had been upon the proceedings a case, clearly warranting the adjudication, I would not have interposed; that I do interpose in this stage of the proceeding upon that ground alone, that I do not think, the adjudication is supported by this deposition; admitting that it is very dangerous to interpose between the adjudication and the Gazette (1).

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(1) *Post, Ex parte Lanchester*, 512, and the note, 513.

The advertisement of the bankruptcy in the Gazette was accordingly suspended; and, an affidavit, required as to the act of bankruptcy, not proving satisfactory, the Commission was superseded.

1. This case is reported likewise in 1 Rose, 49.
2. The cases in which commissions of bankrupt may be superseded before they are opened, or the adjudication thereunder may be stayed, are cases of exception: see, *ante*, notes 1, 2, to *Ex parte Stokes*, 7 V. 405.

### NOVOSIELSKI v. WAKEFIELD.

[1811, FEB. 7.]

THE time not enlarged upon a Bill of Redemption; as upon a Bill of Foreclosure.

THE Bill was filed by a mortgagor; praying redemption; and after the usual Decree a Motion was made by the Plaintiff, that the time for payment may be enlarged.

Mr. Richards, in support of the Motion, admitted, he could produce only one instance upon a Bill for Redemption: *Tipping v. Hawes* (1).

\* Mr. William Agar, for the Defendant, opposed the [\* 418] Motion; insisting, that the consequence of failure in the time appointed for payment of the money is a forfeiture of the estate.

The Lord CHANCELLOR [ELDON].—This Motion upon a Bill to redeem is new; and the case cited must, I apprehend, have gone upon special circumstances; as the difference in principle is obvious. The Plaintiff in a Bill for Redemption professes, that his money is ready. He comes into Court; saying, "here is the money; give me my estate:" but in a suit by a mortgagee for a foreclosure the Court acts against a person, unwilling to pay; and imposes upon him the terms, that, if he does not pay, he shall lose his estate. I admit, that time is given in that case. Finding the practice established by my predecessors, I have done it, with considerable regret; as the effect is frequently a severe grievance to the mortgagee; which I should be extremely unwilling to extend by holding, that a mortgagor may file a Bill of Redemption; offering payment at the distance of a year. I will not begin such a practice; and therefore conceiving, that there is no precedent, refuse the Motion.

SEE, *ante*, note 4 to *Monkhouse v. The Corporation of Bedford*, 17 V. 380, and note 3 to *Bastard v. Clarke*, 7 V. 489, as to the practice of granting a mortgagor an enlargement of the time first fixed for payment of his mortgage debt.

(1) 10th Aug. 1810. On the motion of Mr. Barber; opposed by Mr. Spranger.

## v. MILLS.

[1811, FEB. 7.]

**PAROL** submission to arbitration not within the Stat. 9 & 10 Will. & Mary, c. 15. As to the jurisdiction in Equity against an Award under a reference, made a rule of a Court of Law, for misconduct of the arbitrators, &c. where the Bill was filed before the rule made in the Court of Law, Quære (a).

THE Bill was filed on the 31st of October, 1810; to set aside an award, made in the Vacation; alleging misconduct of the arbitrators in not giving time for the examination of the Plaintiff's witnesses; and also as being upon the face of it an excess of authority; viz. an award, generally, as to all matters in difference; the reference being confined to the accounts of a stage-coach concern between York and Manchester. The Answer alleged, that it was verbally understood and agreed, that all matters in dispute between them should be referred; and that it was upon the faith of such verbal agreement that the Defendant entered into that written agreement. After the Bill was filed, the submission was made a rule of the Court of King's Bench under the Statute (1).

[\* 420] \* A Motion was made for an Injunction.

Sir *Samuel Romilly* and Mr. *Heald*, in support of the Motion.—An objection will probably be taken to the jurisdiction; upon the authority of the cases *Nichols v. Chalie* (2) and *Gwinett v. Bannister* (3): but in those cases the reference had been made a rule of the Court of Law before the Bill filed: in this instance that is done, after the Bill filed, for the mere purpose of ousting the jurisdiction; which, having once attached by the laches of the Defend-

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(a) The Statute 9 & 10 William III. c. 15, in England, authorizing submission to arbitrations to be made a rule of the Court of King's Bench, or other Court of Record, has very materially changed the jurisdiction of the English Courts of Equity, over awards made under submissions in pursuance of the Statute. The question, how far an award made upon submission pursuant to the statute ousted the jurisdiction of Courts of Equity, was much discussed by Lord Chancellor Brougham, who decided against the jurisdiction. *Nichols v. Roe*, 3 Mylne & Keen, 431; 2 Story, Eq. Jur. § 1450, note.

(1) Stat. 9 & 10 Will. III. c. 15; declaring, that it shall or may be lawful for all merchants and traders and others, desiring to end any controversy, suit or quarrel, controversies, &c. for which there is no other remedy but by personal action, or suit in equity, by arbitration, to agree, that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his Majesty's Courts of Record, which the parties shall choose; and to insert such their agreement in their submission, or the condition of the bonds, or promise whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement, being so made and inserted in their submission, or promise or condition of their respective bonds; shall or may upon producing an affidavit thereof, made by the witnesses thereto, or any one of them, in the Court, of which the same is agreed to be made a rule, be entered of record in such Court; and a rule shall thereupon be made by the said Court, that the parties shall submit, &c.

(2) *Ante*, vol. xiv. 265.

(3) *Ante*, vol. xiv. 530; see the note, 534; *Lord Lonsdale v. Littledale*, ii. 451, and the note, 453.

ant, omitting to make the award a rule of Court, cannot be affected by any subsequent act.

Mr. Richards and Mr. Wetherell, for the Defendant.—It is not necessary to enter into the circumstances of conduct; appearing clearly in the Answer; stating beyond the submission in writing to arbitration, some other accounts, distinctly agreed by parol to be included in the submission: all the claims examined a considerable time before the award; which was made upon the omission to produce witnesses against one or two items, objected to; though the opportunity was given. This point is closed for ever by the two cases mentioned: which received great consideration; unless a distinction can be maintained upon the circumstance, that the Bill was filed, before the reference was made a rule of the Court of Law. The Defendant took that step as soon as he could; having no opportunity, before the Bill was filed. The jurisdiction cannot be changed by such an accident.

\* Sir Samuel Romilly, in reply.—A verbal reference can- [\* 421]  
not be set up, beyond the written paper, stating distinctly  
one subject of dispute; upon which agreement in writing the award  
professes to proceed; but was made without evidence; as it was im-  
possible to produce the witness within the time allowed.

The Lord CHANCELLOR [ELDON]:—Another objection arises in this case. Taking the arbitrator to have had power by parol to enter on other subjects than those contained in the written submission, can the award as to so much as is introduced by parol be made an award upon a reference under the Statute? I have always understood, that, where an award is to be made a rule of Court, the submission, that it shall be so, must be in writing. If there is a parol agree-  
ment to make a reference a rule of Court, until it is actually made so, either party may recede from it. The word "insert," in the Statute must mean an act, that infuses that submission into something written.

See the notes to *Mitchell v. Harris*, 2 V. 122.

## WILKINS v. AIKIN.

[1810, AUGUST 4.]

COPYRIGHT in an individual work; not in a general subject; though from its nature, the consequence may be close resemblance, and considerable interference, as in the case of maps and road books (a).

Action directed, to try, whether a work on architecture was original; with a fair use of another work, by quotation and compilation; which in a considerable degree was admitted (b); the Injunction maintained in the mean time; viz. by permitting the sale on undertaking to account according to the result of the Action (c).

Whether the copying of a map, as an illustration in a fair history of all the maps of a County, would be restrained, as an invasion of Copyright, *Quare*, [p. 425.]

THE Bill stated, that in 1807 the Plaintiff, having travelled into Sicily and Greece, published a work in one volume folio under the title of "The Antiquities of Magna Græcia," with prints, taken from drawings, made by him at great expense; and that the Defendants have lately published and sold in one volume folio a work, entitled "An Essay on the Doric Order of Architecture;" which is in a great measure a copy of the Plaintiff's work; both as to several of the pages and prints; in opposition to the pretences alleged, charging that the Defendants' work is not a fair abridgment of the Plaintiff's; and that many whole passages are printed without alteration; and praying an account and Injunction.

The Defendants by their Answer stated, that Aikin was a member of a Society of Professors of Architecture; and his work was an essay, chosen by himself; and composed according to the rules of the Society; and published by their Order, without any intention of injuring the Plaintiff's work; with which it was not conceived to interfere; and the Defendant had begun the composition of his essay, and made the drawings of most of his plates, before the Plaintiff had published his work. They stated, that they do not conceive, that the Defendant's work is an exact copy of the Plaintiff's; but submit, that the nature of it is entirely different; that neither of them can come into com-

(a) See *ante*, note (b) *Carey v. Foden*, 5 V. 24; and particularly as to maps and road-books, note (a) *Longman v. Winchester*, 16 V. 269.

(b) In some cases of this nature a Court of Equity will take upon itself the task of inspection and comparison of books alleged to be a piracy. *Lewis v. Fullerton*, 2 Beavan, 6. But the usual practice is, to refer the subject to a Master, who then reports, whether the books differ, and in what respects; and upon such a report, the Court usually acts in making its interlocutory, as well as its final decree. 2 Story, Eq. Jur. § 941; *Eden*, Injunc. ch. 13, p. 289.

In the case of a patent, if it has been but recently granted, and its validity has not been ascertained by a trial at law, the Court will not generally act upon its own notions of the validity or invalidity of the patent, and grant an immediate injunction; but will require it to be ascertained by a trial in a Court of Law, if the defendant denies its validity, or puts the matter in doubt. 2 Story, Eq. Jur. § 934; *Bacon v. Jones*, 4 Mylne & C. 433, 436.

(c) 2 Story, Eq. Jur. § 932, 933, 934, 935; *Bacon v. Jones*, 4 Mylne & C. 433, 436.

petition with, or injure the sale of, the other ; as the Plaintiff's work is an account of the Antiquities of Magna Graecia : not only giving \* full and detailed accounts of the existing remains of architecture, with conjectural and theoretical restorations, but also entering at large into the history of the various states : the Defendant's Work being confined to architecture, and to the Doric Order only ; and the Defendant, instead of copying, having only quoted and used, the Plaintiff's work, as the works of others, and not surreptitiously.

The Answer then stated some instances, in which the Defendant had copied from the Plaintiff's work ; representing them as fair quotation, compilation, and abridgment ; as the Plaintiff had quoted, and referred to, preceding authors ; admitting also, that the Defendant had, in some instances, pointed out, copied from the Plaintiff's drawings ; insisting, that in all other parts of his plates the Defendant had not copied from the Plaintiff's drawings or prints ; but had himself drawn from the arithmetical figures of measurements, mentioned in the Plaintiff's plates, and in the text of his work ; and by no means from his diagrams or drawings ; that in so constructing his plates he had discovered various instances, in which the Plaintiff's measurements are inconsistent with his delineations, and with each other ; describing, in what respect the Defendant's plates were original, and more correct ; and concluding, that his work was, not an abridgment of the Plaintiff's, but a distinct work ; containing some quotations from, and abridgments of, small parts of the Plaintiff's, by no means the most valuable or material ; forming only a very small part of the Defendant's work ; consisting of twenty-three pages of letter-press ; of which such abridgments and quotations, dispersed in different parts, do not in the whole exceed three pages : the Plaintiff's work consisting of seventy-four : the Defendant's work having only seven plates ; and the Plaintiff's seventy-two plates and thirteen vignettes ; \* those parts, which form the subjects of complaint, having been formerly given to the world by various authors ; and the said quotations, abridgments, and copied lines, are such as may fairly be taken by one author from another ; especially by authors, treating on any particular branch of architecture, from those, who have visited and described particular buildings, which illustrate such art.

Mr. Hart and Mr. Bell, for the Defendant, moved to dissolve the Injunction.

Sir Samuel Romilly and Mr. Shadwell, for the Plaintiff.

The Lord CHANCELLOR [ELDON].—The jurisdiction upon subjects of this nature is assumed merely for the purpose of making effectual the legal right ; which cannot be made effectual by any action for damages ; as, if the work is pirated, it is impossible to lay before a Jury the whole evidence as to all the publications, which go out to the world, to the Plaintiff's prejudice. A Court of Equity therefore acts, with a view to make the legal right effectual by pre-

venting the publication altogether; and accordingly in the exercise of this jurisdiction, where a fair doubt appears, as to the Plaintiff's legal right, the Court always directs it to be tried; making some provision in the interim, the best, that can be, for the benefit of both parties.

There is no doubt, that a man cannot under the pretence of quotation, publish either the whole or part of another's work; though he may use, what it is in all cases difficult to define, fair quotation. Difficulties have arisen in cases, that have occurred; upon which I should have taken the same course by sending them to the

[\* 425] \* consideration of a Court of Law. In the case of maps (1), for instance: one man publishes the map of a county: another man, with the same design, if he has equal skill and opportunity, will by his own labor produce almost a *fac simile*; and has a right to do so: but from his right through that medium was it ever contended, that he might copy the other map? Suppose a publication; professing to be an account of the improvement of maps of the county of Middlesex; compiling the history of all the maps of it ever published; pointing out the peculiarities, belonging to them; and giving copies of them all; as well those, the copyright of which have expired, as those, of which it was subsisting: it is not easy to say with certainty, what would be the decision upon such a case. If it was a fair history of the maps of the county, which had been published, and the publication of the individual map was merely an illustration of that history, that is one way of stating it: but if a jury could perceive the object to make a profit by publishing the map of another man, that would require a different consideration. The slightest circumstances therefore in these cases make the most important distinction. So in the case of a book of roads: there is no doubt, that, though any man may publish a book of roads, that would be precisely the same as Patterson's, yet he cannot take that book, and copy it (2).

The fair question therefore upon such a compilation as this is, whether it is competent to the Defendant to publish to the world, these plates; which it is admitted he could not publish as copies of the Plaintiff's. I have no doubt, that both these parties

[\* 426] are actuated by very honorable \* views. Upon inspection of the different works I observe a considerable proportion, taken from the Plaintiff's, that is acknowledged; but also much, that is not; and in determining, whether the former is within the doctrine upon this subject, the case must be considered as also presenting the latter circumstance. The question upon the whole is, whether this is a legitimate use of the Plaintiff's publication in the fair exercise of a mental operation, deserving the character of an original work. The effect, I have no doubt, is prejudicial: it does not fol-

(1) See, *ante*, *Matthewson v. Stockdale*, vol. xii. 270; *Longman v. Winchester*, xvi. 269.

(2) *Curnan v. Bowles*, 2 Bro. C. C. 80; *Cary v. Longman*, 1 East, 358; *Cary v. Faden*, *ante*, vol. v. 24; see the note, 26.

low, that therefore there is a breach of the legal right : but where that is so, and there is a fair question, the Injunction ought not to be dissolved : but according to the usual course, maintaining the Injunction, an action should be brought forthwith. The proper course in this instance will be to permit this work to be sold in the mean time : the Defendant undertaking to account according to the result of the action.

See the notes to *Cary v. Foden*, 5 V. 24.

### ROWTON, Ex parte (1).

[1810, August 17, 22.]

**Short bills remitted by a Country bank to their banker in London ; standing at the bankruptcy of the latter entered short, in the usual way ; not being due.** Ordered on Petition in the bankruptcy to be delivered up by the Assignees to the Country bank ; who, not being creditors, when the Petition was presented, the cash balance being against them, had since become so ; turning it in their favor by taking up the bankrupt's acceptances on their account. The Order was made without requiring the Petition to be amended by stating that fact; but upon consent of the Crown ; holding an extent for acceptances of the bankrupt on account of duties, received and remitted specifically by the Country bank.

**Short Bills in the hands of a banker are specifically the property of the remitter ; subject to a lien for the balance of the account, [p. 431.]**

**Preference of the assignment under a Commission of bankruptcy to an Extent for general acceptances, not due at the bankruptcy, [p. 431.]**

**Distinction upon acceptances for the money of the Crown, specifically remitted, [p. 431.]**

**Whether the debt, so constituted, can be altered by taking the acceptance, or it is to be considered only as a collateral security, *Quare*, [p. 431.]**

At the time of the bankruptcy of Brickwood and Co., bankers in London, the account between them and \*the [\* 427] petitioners, constituting the Chester and Shrewsbury Bank, stood thus :

| BRICKWOOD & CO.                  | Dr.    | Cr.  |
|----------------------------------|--------|--|
|                                  | £      | £  |
| By Remittances { Cash, . . . . . | 21,000 | Acceptances of Bills, drawn by the Petitioners in favor of the Excise, . . . . . |
| { Short Bills, . . . . .         | 20,000 | 20,000   |
|                                  |        | Acceptances of Bills, drawn in favor of Individuals, . . . . .                   |
|                                  |        | 6,000  |

Neither the short bills nor the acceptances of the bankrupts, were due, when the Commission issued. The former were entered short according to the usual course of bankers in London (2). The

(1) 1 Rose's Cases in Bankruptcy, 15.

(2) This entry is in a separate column of the account ; specifying the amount

bills, held by the Excise, were drawn on account of Excise duties, received by the petitioners; and upon that debt an extent had issued against the bankrupt's property.

The Petition prayed an Order upon the assignees to deliver up to the petitioners the excess of the short bills beyond what was sufficient with the cash balance of 21,000*l.* to cover the outstanding acceptances.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Trower*, for the assignees, objected, that the Lord Chancellor had no jurisdiction in bankruptcy to make such an Order; and the Lord Chancellor, agreeing to that, was proceeding to dismiss the petition; but, being pressed with the extreme importance to the petitioners of obtaining relief; which could not upon a bill be had before the Vacation, and upon a suggestion, that the Crown, being satisfied out of the cash balance, would consent, gave permission to have it argued.

[\* 428] \*In the interval the consent of the Attorney-General, on the part of the Crown, was procured; and the petitioners having taken up such of the acceptances for 6000*l.* as had fallen due, namely, 5300*l.*, stood as creditors of the bankrupts; having a right to prove under the Commission.

Mr. *Leach* and Mr. *Montague*, in support of the Petition.—These petitioners, who, it is true, were strangers to the Commission, when the petition was presented, now stand here as creditors; entitled, and desirous, to prove their debt under the Commission. The assignees, admitting all the facts, that, besides these short bills, they are in possession of 21,000*l.* in cash, applicable under the Commission, raise this objection, not upon any merits, but for the purpose of imposing terms, to which under these circumstances, and at this period, prudence may compel the petitioners, if they cannot obtain this summary relief, to submit.

With regard to the question of jurisdiction, considered as applied to the case of a mere stranger, as it stands upon the face of the petition, abstracted from the fact, that has since occurred, the jurisdiction must be maintained. It is derived from the nature of the authority, given to the Lord Chancellor by the bankrupt laws: and has been exercised without any doubt in various instances: *Ex parte Clare* (1). *Ex parte Flyn* (2). *Ex parte Dumas* (3). *Ex parte Emery* (4). *Ex parte Oursell* (5). *Ex parte Murray* (6). *Ex parte Sayers* (7). \*In none of these cases does it appear, that

[\* 429] the jurisdiction was exercised upon the consent of the par-

of the bill; and the time, when it will be due; and the amount, when received, is carried into the column of cash. See *Giles v. Perkins*, 9 East, 12.

(1) 1 Cooke's Bank. Law, 5th edit. 383; 8th edit. 390.

(2) 1 Atk. 185.

(3) 1 Atk. 233; 2 Ves. 582.

(4) 2 Ves. 674.

(5) Amb. 287.

(6) 1 Cooke's Bank. Law, 5th edit. 379; 8th edit. 384.

(7) *Ante*, vol. v. 169.

ties. In *Ex parte Stephens* (1) upon a Petition by a creditor and a stranger the Lord Chancellor made an Order, restraining the assignees from proceeding at law: an Order substantially for the benefit of the stranger.

These Petitioners, by presenting their Petition submit to the jurisdiction; and your Lordship will enforce obedience from them to any Order you may think proper to make. Upon principle, and without relying on these authorities, the consent of the assignees is not required. Under the first Statute (2) upon this subject, vesting the property by a summary process in certain high officers of state, for the satisfaction of the creditors, would not the Petition of a stranger, proving, that his property, to which the creditors had no title, was seized, and praying, the restoration of it, have been immediately granted? Can it be maintained, that he would have received this answer? "It is true: your property has been seized; and the law is clear, that the creditors have no right to it; yet it shall not be restored to you, the true owner?" The dominion over the property by this summary process was given for the purposes of justice; and from the nature and object of that dominion an authority to prevent injustice may be implied.

The next Statute (3), transferring the powers, given by the former, to Commissioners, appointed by the Lord Chancellor, makes no difference in this respect; and it cannot be represented, that the assignees, appointed under a subsequent Statute (4,) have greater authority than the Commissioners had previously. The assignees are intended \* to assist, not to obstruct, the Great [\* 430] Seal in the due administration of the bankrupt's estate; subject to the same control as other officers in the superior Courts; *Ex parte White* (5). An officer of a Court of Common Law, obtaining under color of his office property, to which he has no title, is ordered instantly to restore it; and why should assignees be permitted to retain property, to which they admit they have no right in law or equity? Except with reference to the Statute of James I (6), which has no application to a deposit of short bills, the assignees are in no better situation than the bankrupts would have been in. Brickwood and Co., if they had not been bankrupts, could have maintained no claim to this property; and the disappointment of the assignees by the effect of the right of the Crown to take twenty shillings in the pound out of the other property, cannot give them a better title.

At least, if the opinion, that this jurisdiction cannot be exercised in favor of a stranger, prevails, an opportunity should be allowed to amend the Petition by bringing forward the actual state of the ac-

(1) *Ante*, vol. xi. 24.

(2) Stat. 34 & 35 Hen. VIII. c. 4.

(3) Stat. 13 Eliz. c. 7.

(4) Stat. 5 Geo. II. c. 20, s. 26.

(5) 1 Atk. 90.

(6) Stat. 21 Jam. I. c. 19, s. 11.

counts at present; by which the Petitioners will appear to be creditors in respect of 5300*l.* of the bills for 6000*l.* taken up, as they became due; only 700*l.* being left outstanding: which will also be taken up, when due, in the course of a few days.

*Aug. 22d, 1810.* The Lord CHANCELLOR [ELDON].—The first question is, whether under the circumstances of this case these short bills ought to be delivered up: if they ought, secondly, [\* 431] whether sitting in Bankruptcy I \* have jurisdiction to make an Order for that purpose on Petition; as in the Court of Chancery by Decree.

If the Bankruptcy had not happened, it is clear, that the Country Bank would have been entitled to say, the short bills were their property in the hands of Brickwood and Co. subject to a lien upon them for the balance of the account; but not to be considered as cash; being written short; and credit not given for them as cash; and therefore upon an offer to let the cash balance be applied in extinction of the acceptances of Brickwood and Co. on account of the Country Bank, and to provide for the deficiency, they would have been entitled to have the short bills delivered up. The assignees then are in no better situation, with reference to the law of mutual credit, than the bankrupts themselves would have been in.

Then, with regard to the extent in the late case of *The Attorney General v. Bebb* the opinion of the Court was, that where the Crown had taken acceptances, not due at the time of the bankruptcy, having by virtue of those acceptances given credit, and the bankrupt not being indebted at the time of the bankruptcy, the assignment would prevail over the extent; and, if this case was precisely the same, it would be for the consideration of the Attorney General, how far he would keep the extent alive. There is however a great distinction between acceptances in the hands of the Commissioners of Excise, where the specific money of the Crown, or bills, taken for it, cannot be proved to have been remitted to the banker in town, and where that can be proved. Such a case occurred about thirty years ago; where the bankers, having received the specific bills [\* 432] or money, \* were considered as the Crown's debtors; and recollecting the nature of a debt to the Crown, it is difficult to maintain, that, the debt being constituted, a mere acceptance, given to the Commissioners of Excise, can alter the nature of that debt; that it can be considered as more than a collateral security. As to the effect of the extent I shall say nothing; observing merely, that the officers of the Crown are not willing to pursue questions, that cannot be supported. Still the question is, what is the law. If the Crown has these extents, and can take this cash balance in discharge of these acceptances, let them take it; and the assignees, unless they can support the objection to the jurisdiction, have hardly any case to state.

Then can this be done in bankruptcy? I am upon farther consideration strongly of opinion, that I have this jurisdiction; and I

shall exercise it without requiring them to amend their Petition ; merely to state the fact, that they are now creditors, claiming to prove under the commission. As those, who make the application, submit to the jurisdiction, I can bind them ; and, as far as the assignees are concerned, I have a right to take order for the disposition of the effects. Considering the Petitioners therefore entitled to have these short bills delivered up, I grant the Order for that purpose.

The Order was made accordingly for delivering up the short bills, and the proceeds of such as had been received ; stating the consent of the Crown (1).

1. This case is likewise reported in 1 Rose, 15.
  2. Bills remitted to a banker, and remaining in his hands at his bankruptcy undischarged, or, if due, not applied in the way they were directed to be appropriated, remain the property of the remitter, subject only to a *lien* for the amount of any balance due from him to the bankrupt : see, *ante*, the notes to *Ex parte Sayers*, 5 V. 169.
  3. A commission of bankruptcy will prevail against a subsequent extent at the suit of the crown ; and it is no objection to a commission that it was issued for that very purpose : *Wydown's case*, 14 Ves. 87.
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## DANIELS v. DAVISON.

[\* 433]

[1811, MARCH 1.]

SPECIFIC performance of a contract to purchase enforced against a subsequent purchaser, at an advanced price, with notice ; who was decreed to convey on payment to him of the price, for which the Plaintiff contracted. The possession of a tenant is notice to a purchaser of the actual interest he may have ; either as tenant ; or farther, as in this instance, by an agreement to purchase the premises (a).

In this case (2) the Lord CHANCELLOR [ELDON] pronounced the following judgment :

I have already expressed my opinion, that the Plaintiff is entitled to a specific performance of the agreement for the sale of these premises to him ; and, with regard to the subsequent sale by the Defendant Davison to the other Defendant Cole, my notion is, that the Plaintiff has an Equity to have a conveyance of the premises from Cole ; upon the ground, that Cole must be considered in Equity as having notice of the Plaintiff's equitable title under the agreement ; that Cole was bound to inquire ; and therefore, without

(1) *Post*, *Ex parte Sollers*, vol. xviii. 229 ; *Ex parte Pease and Others*, Country Banks, xix. 25, 201, and the references ; 1 Rose, Bank. Cases, 232, 243, 254, 280 ; *ante*, *Hassell v. Smithers*, xii. 119.

(a) Where a tenant is in possession of the premises, a purchaser has implied notice of his title. See *ante*, note (a) *Daniels v. Davison*, 16 V. 249 ; note (a) *Taylor v. Stibbert*, 2 V. 439.

(2) Reported, *ante*, vol. xvi. 249.

going into the circumstances, to ascertain, whether he had, or had not, actual notice, he is to be considered as a purchaser of the other Defendant's title, subject to the equity of the Plaintiff to have the premises conveyed to him at the price, which he had by the agreement stipulated to pay to that Defendant; and that it is competent to the Court to make that arrangement as between Co-defendants.

The Plaintiff therefore, deducting his costs out of the money he is to pay, must have such conveyance from one or both the Defendants, as the Master shall settle, if they differ: but I can go no farther than to regulate as between the Defendants the payment of that money, which the Plaintiff is to pay.

*See, ante*, the notes to *S. C.*, 16 V. 249.

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[\* 434]

PURCELL v. M'NAMARA.

[1811, MARCH 6, 17.]

RE-EXAMINATION not of course; but at the discretion of the Court on special application.

Order, after Decree, on behalf of a Defendant for the examination of another Defendant upon Interrogatories, who had been examined, and cross-examined; restrained to such of the points in the cause, to which she had not been examined, as the Master should think reasonable.

Interrogatories for examination of a party settled by the Master.

A MOTION was made on behalf of the Defendant M'Namara, that the other Defendant Margaret Purcell may be examined upon interrogatories before the Master. The Motion was made after the Decree (1); and this Defendant had been examined in chief; and cross-examined.

Mr. William Agar, for the Defendant, moved it as a Motion of course.

Sir Samuel Romilly and Mr. Hart, for the Plaintiff, objected to this, as a Motion of course; insisting, that such an application could only be made upon affidavit as to the points, to which the testimony of this party, who had been already examined, and cross-examined, was required.

Mr. Agar referred to the case of *Browning v. Barton* (2) and *Sawyer v. Bowyer* (3).

Mr. Cooke (*Amicus Curiae*) said, the interrogatories for the examination of a party are settled by the Master; not, as in the case of a witness, by Counsel.

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(1) *Ante*, vol. xiv. 91. See *Franklyn v. Colquhoun*, xvi. 218.

(2) 2 Dick. 508.

(3) 1 Bro. C. C. 388.

(1) The Lord CHANCELLOR [ELDON] agreed to that; and said, though the usual direction is to examine the parties as the Master shall think fit, the practice had been long settled, that the Master cannot, without an Order, examine a party, who has been previously examined; that it is not of course; but in the discretion of the Court to \* grant or refuse it. His Lordship said, [\* 435] he would consult the Master; and on a subsequent day intimated the Master's wish to examine this Defendant upon certain points.

The Order was afterwards drawn up from the following Minute, approved by the Lord Chancellor:

"Let the Master be at liberty to examine the Defendant Margaret Purcell upon interrogatories to such of the points in this cause, to which she has not yet been examined, as the Master shall think it reasonable, that she should be examined to; and the Master is to settle the interrogatories (2)."

*See, ante, the notes to S. C., 14 V. 91.*

### LANGHAM v. SANFORD.

[ROLLS.—1811, MARCH 11, 12, 15.]

EXECUTOR, having general and specific legacies, not expressly for his care, &c. was not precluded from giving evidence of the intention, that he should have the residue beneficially, by an exception of plate out of furniture bequeathed to him, and by a bequest to him of a contract for a leasehold house, subsequent to the appointment of Executor: the effect being only, that he should not take the plate under that bequest of furniture; and a future disposition of the residue might have been contemplated.

Upon the evidence, raising no direct intention in his favor, but mere inference from equivocal declarations, with an intention to make an express residuary disposition, the Executor declared a trustee of the residue for the next of kin (a). Executor, having a legacy expressly for his care, &c. cannot produce evidence of intention, that he should take the residue beneficially, [p. 443.]

SIR JOHN CHICHESTER made his Will, dated the 28th of May, 1808, beginning in the following terms:

"I Sir John Chichester of Upper Grosvenor Street in \* the county of Middlesex do give and bequeath to my [\* 436] friends hereinafter mentioned the following legacies to be paid out of my personal estate within one year after my decease: to the Reverend John Sandford of Sherwell in the county of Devon the sum of 10,000*l.* sterling - together with my furniture in my

(1) *Ex Relatione.*

(2) See *Sandford v. Paul, ante*, vol. i. 398, and the note, 400.

(a) The questions between the executor and next of kin as to an unbequeathed residue are of little practical importance in the United States, and in England since the Statute 1 Wm. IV. cap 40. See *ante*, note (a) *Griffiths v. Hamilton*, 12 V. 298; note (a) *Nourse v. Finch*, 1 V. 344; note (a) *Nisbett v. Murray*, 5 V. 158.

houses in Upper Grosvenor Street and at Wickham, (plate only excepted)."

The testator then gave several pecuniary legacies, among them, "to Mrs. Vernon, Mrs. Fry, and Mrs. Edwards, daughters of my late uncle William Chichester 500*l.* each : to Charlotte and Jane Sanford daughters to the late John Sandford of Nynehead, 3000*l.* each ;" followed by a legacy, and annuities to servants ; and concluded thus :

" And I appoint the aforesigned John Sandford, Clerk, my executor."

The testator executed three codicils on the 29th and 31st of May, 1808 : two of them merely giving legacies : the third, dated the 31st, containing the following declaration :

" As I have this day given directions to Mr. Harman to prepare a Will for me disposing of my paternal and maternal estates but lest I should die before the same can be got ready for my signature I do hereby give all the timber growing upon the estate of my wife which I inherit from her that is fit and proper to cut down to George Chichester Oxendon second son of Sir Henry Oxendon, Bart. for his own absolute use and benefit for ever."

By the fourth codicil, dated the 3d of September, 1808, [\* 437] after devising his estate at Ashtop, in the county of Devon, to George Chichester Oxendon, he made the following disposition :

" I give the house in Seymour Place for which I have given a memorandum of agreement to purchase (and which is to be paid for out of timber which I have ordered to be cut down) to the Reverend John Sandford."

The testator died on the 30th of September, 1808. The Bill was filed by some of the next of kin ; praying an account, and a distribution of the residue.

The Defendant John Sanford by his answer insisted, that it was the intention of the testator, that he should take the residue as executor ; and went into evidence.

Abraham Scott, who had two legacies of 500*l.* each, and was noticed by the testator as one of his best friends, by his depositions stated, that on calling on the testator professionally as an apothecary, on the 10th of March, 1807, the testator expressed great anxiety to make a Will ; and, the deponent recommending him to employ a professional man, the testator said, that he should do at another time ; but he only wanted then to provide for his friends. He desired the deponent to write the preamble of a Will for him ; which the deponent took to him in the evening. The testator, having written about an hour, on finishing told the deponent, that he then found himself perfectly easy ; as he had provided for his friends. On the 16th of April, the deponent by the testator's desire assisted in finding his Will (a paper, the probate of which was rejected). On the 14th of May, 1808, the testator desired the deponent to write the preamble to his Will over again ; as he wished to make some altera-

tions: in particular, as he was determined to give the Ashton estate to the second son of Sir Henry Oxendon, he should withdraw \* his pecuniary legacy. The deponent began to write [\* 438] accordingly: the testator dictating the names of several friends and others from the former paper. On the 21st of May by the testator's desire the deponent recommended him a Solicitor; to whom, on the 24th the deponent delivered papers, received from the former Solicitor, viz. Hole's instructions for the testator's Will, as far as related to the disposition of his real estate. That Solicitor sent the draft to the deponent; and on the 28th of May the testator produced to him both the former papers; that written partly by the deponent, with the blanks for legacies supplied, and the other, dated and signed by the testator. The deponent said, "Sir John, I suppose you intend the real estate to go to your heir-at-law:" he answered, "Yes: but not all." On the 28th of May, 1808, the testator informed the deponent, that he had farther alterations to make: viz. to give the furniture of his houses in Grosvenor Street and Wickham to the Reverend John Sandford, plate excepted; which the deponent interlined in the paper, marked A (the first paper, written partly by the deponent; of which probate was rejected); and the testator said, he wished to transpose some of the names of the legacies; as it did not seem respectful to the Misses Sandford to place their names after his servants; and to alter an annuity and legacy. He then dictated to the deponent the paper, marked B (the first in the probate). Towards the conclusion of that paper the deponent suggesting the propriety of naming an executor, the testator named the Defendant Sandford, and the deponent, if he had no objection. He declined; saying he considered one sufficient. The deponent offered to witness the execution; to which the testator objected; saying, he intended to give him a legacy: but, the deponent informing him, that he might do that by a subsequent paper, the paper marked B, was then \* executed; and witnessed by the deponent. On the 29th of May the deponent filled up the blanks in the draft, prepared by the Solicitor, under the testator's direction; appointing Sandford and Hole residuary legatees, and Sandford and three others executors; and the next day returned all the papers to the Solicitor for the purpose of incorporating the legacies and disposition of the personal property in the draft of the Will of the real estate. [\* 439]

The Reverend Thomas Hole proved the paper, marked C (Instructions for a Will): the whole, written by him at the testator's request in the end of March or the beginning of April, 1808. In a conversation about his heir, Arthur Chichester, the testator said, "Oh! I may make any person my heir." He assented to the deponent's suggestion to give him (Arthur Chichester) the paternal lands; to support the title; and, being asked, how he meant to dispose of his maternal lands at Ashton, said, he meant his aforesaid heir-at-law to have them. The deponent said he would tell him, for perhaps he did not know, to whom his personal estate would belong

upon his dying intestate ; and accordingly named all his next of kin : nine in number. The testator appeared much startled at some of the names ; and upon one clearly indicated dislike. The deponent suggested, that the meeting of such different persons, in education, character, &c. as the next of kin consisted of, would be unpleasant : and probably a sale or auction at each of his houses would be the consequence ; and mentioned particularly three of them, as objects of his bounty ; who, though they had offended him by their marriages, so that he had not seen them, were still his near relations. The testator said, he would give them 500*l.* each ; and appeared pleased with the disposition, advised by the deponent ; who read to him some additional clauses introduced : viz. powers to [\* 440] the trustees to make a settlement \* on the heir's marriage, and a provision for his younger brother : a disposition of the plate, pictures, books, and furniture, of his family seat at Youlston to the trustees, as heir-looms ; power to the trustees to grant leases ; with a form for the disposal of his personal property, and the appointment of executors and residuary legatees ; all which he approved : particularly as to the heir-looms ; saying, it was the very thing he could wish. The testator mentioned the paper, drawn by Scott ; asking, whether he had not better destroy it : the deponent said it would be rendered useless by the execution of the Will, to be prepared from this paper ; and that the legacies in that paper, with any others he might choose to add, together with the names of executors and residuary legatees, might be added in his new intended Will.

Ann Elizabeth Charlotte Sanford stated, that about the latter end of May, 1808, the testator told her, he had been disappointed in making his Will, when he went to town ; and that it was a great weight upon his mind ; and asked her brother John Sanford and her sister Jane, whether they knew, who were his next of kin, and would come in for all his personals, if he should not dispose of them ; and did with an air of ridicule at their meeting together upon the disposition of his property enumerate them ; and on or about the 1st of June, the testator being anxious to go to Broadstairs, and having said, he should avoid signing his Will, the deponent remonstrating with him upon leaving Wickham, before he had signed such Will, he said, it was of no consequence, for that he had settled all his personals ; and cared for nothing else.

Jane Sanford also represented, that on the 29th of May the testator represented to her and her sister his disappointment about his Will, &c. ; asking, if they knew, who were his heirs ; saying he was certain, they had no idea who they all were ; and then [\* 441] mentioned them ; and \* seemed diverted by the thoughts of the behavior of such persons on meeting together.

The Reverend H. Hutton stated, that on different occasions in the summer of 1808 he had various conversations with the testator at Broadstairs relative to his testamentary disposition of his property ; and he several times declared, that he had disposed of his per-

sonal property; and he did not care any thing about his landed estate ; and particularly declared, that he had settled his personal property, and given several large legacies to different persons ; and that he had thought it right to give a legacy to each of his next of kin ; as they might have been disappointed by his making a Will. He sometimes mentioned some of his next of kin ; but made no declaration, except as above, whether he had made, or intended, any bequest of his personal estate in their favor ; or as to his residuary estate, or the distribution thereof. The Defendant Sanford, while at school and college, spent the vacations, and afterwards lived, with the testator.

*Mr. Richards, Mr. Leach, and Mr. Wingfield*, for the Plaintiffs : *Mr. Hart, Mr. Bell, Mr. Martin, Mr. Maddock, and Mr. Boteler*, for others of the next of kin, Defendants, opposed the admission of evidence ; insisting, that upon the face of the several instruments there was declaration plain, that the executor was not to have the whole personal estate ; particularly by the exception of the plate ; which is not, as the pictures excepted in *Southcot v. Watson* (1), disposed of. So, the bequest to Mr. Sanford of a leasehold house by the fourth codicil is another plain demonstration, that he was not intended as executor to have the residue, of which that house \* would have formed part ; and upon that supposition therefore it was unnecessary to give it to him specifically. The plain conclusion is, that what might be left should be the subject of future arrangement ; and the evidence is therefore offered to contradict the Will.

Sir *Samuel Romilly*, Mr. *Toller*, and Mr. *Courtenay*, for the Defendant, the executor.—The result of all the authorities, is, that the executor may by parol evidence rebut the presumption, arising from a legacy to him. The intention, as to the household furniture, was to give him that, as a specific bequest ; but not the plate ; and, as a shorter mode of executing that purpose, the testator excepts the plate ; meaning only, that the plate should not go as part of that specific bequest ; but should form part of the general fund for debts, &c. The case may be supposed of an insolvent estate : the testator contemplating his plate, as necessary for the discharge of his debts. The same intention appears to give the house, for which he had contracted, to his executor specifically, exempt from the debts. There is no reason therefore to say, the evidence is offered to contradict the Will ; and evidence has never been rejected, except where the legacy was clearly given to the executor in that character, for his care and pains ; but, where it admits either construction, not being inconsistent with the object, that the executor should have the residue, evidence is necessarily admitted to explain the intention ; which upon the expression of the Will is equivocal.

The MASTER OF THE ROLLS [GRANT].—To raise the objection to the admission of the evidence, it must be such as tends to contradict

the Will. It does not appear, that this Will does unequivocally convey upon the face of it the intention to exclude the executor \* from the residue. It is not sufficient, that it furnishes argument in favor of that intention. A legacy to an executor for his pains and labor is a declaration, that he is to take the office, as an office of burthen ; and is not to have the benefit of an estate ; the admission of evidence therefore of an intention, that he should take the beneficial interest, would be to contradict the Will : but in this case, according to the strict letter, the testator does not say, the executor is not to have the plate ; but merely, that he is not to have the plate as part of the furniture. That is the amount of the exception. However therefore it may furnish an argument, it does not necessarily imply, that the testator might not intend, that his executor should take his plate, if not wanted for the other purposes of the Will, as part of the residuary estate.

Another supposable case is, that the testator had at that moment an intention, that the executor should not take it, meaning to dispose of it to some other person, but not carrying that intention into execution. Either way the exception, whatever argument may be drawn from it in the course of the discussion, does not raise such a conclusive inference as to exclude the parol evidence.

The evidence was accordingly read.

*For the next of kin.*—The law is now clearly settled, particularly by the able judgment of Lord Alvanley, in *Clennell v. Lewthwaite* (1) : that a legacy converts the executor into a trustee \* for the next of kin as to the residue, undisposed of ; without regard to the circumstance, that the next of kin may have legacies ; or that the testator may have indicated a strong aversion to them : their right being constituted, not by intention in their favor, but by the absence of intention upon the subject. Parol evidence is therefore admitted of a positive intention, that the executor should take the residue ; and of course on the other side, in support of the presumption for the next of kin. The executor must show the intention in his favor at the time of making the instrument : a fact, which is not proved by the testator's declarations previous, or subsequent, to the execution ; though such declarations, not merely loose conversation, may certainly form material evidence ; as tending to show his mind at the time of making the appointment of executor ; not at the antecedent, or subsequent, period, when the declaration was made ; and that must depend upon his knowledge at that time, when the instrument was made, that the executor would take the residue, not given to some other object.

No intention appears in any of these instruments to make a general disposition of all the property. Upon this evidence the induce-

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(1) *Ante*, vol. ii. 465. The Decree affirmed by the Lord Chancellor, 644. See *Pratt v. Sladden*, xiv. 193, and the references, 197, note ; *Walton v. Walton*, xiv. 318 ; *Dawson v. Clarke*, xv. 409 ; *post*, xviii. 247 ; and the note, *ante*, i. 362, *Nourse v. Finch*.

ment to appoint an executor proceeds from Scott ; and it is not pretended, that he was to have any part of the residue. The testator, intending to give him a benefit, is explicit ; but, where he means only to appoint to an office, indicates nothing more. He had, impressed upon his mind, the necessity of appointing a residuary legatee. The utmost extent of the argument is, that he was ignorant of the nature and effect of the appointment of executor : but the claim of the executor cannot stand upon that foundation.

\* *For the Executor.*—First, as to the bequest of the [\* 445] furniture, this is no more than a specific legacy ; which, it is true, would make an executor a trustee of the residue : the effect of the exception being, not, as is represented, that the executor was not to take the plate, but as has been observed by the Court, that he was not to take it as part of the furniture, then bequeathed to him ; meaning it to go with the residue. No presumption therefore arises from that exception. The reason, always assigned for the presumption from a legacy to the executor, certainly not very satisfactory, that the testator, giving him a part, cannot mean him to take the whole, applies equally to the case of every specific legacy. The preamble of this Will does not show the limited purpose to give legacies, and do nothing more ; and the circumstance, that by the Will and codicils every one of the next of kin has a legacy, may be represented at least as favorable to the executor ; who also was the principal object of his bounty ; taking more than twice as much as any other person ; and must have been paramount in his thoughts, when expressing an anxiety to provide for his friends. Upon the frame of the Will therefore there is nothing distinguishing this case.

As to the Law, there is no doubt, that a legacy to a sole executor is alone sufficient to convert him into a trustee : if, for his care and pains, if in any manner expressed as the proposed recompense for his trouble, it is considered so decisive, that an office of trust only, without benefit, is conferred, that parol evidence shall not be admitted. This presumption however against the executor has not in modern times been regarded with much favor. It has prevailed, not so much from the satisfaction it has produced, as from the mischievous consequences of disturbing a rule, long established ; in \* reliance upon which many Wills must have been [\* 446] made : but the Court has leaned strongly against it ; and, where from evidence an intention not to exclude him could be collected, has held, that the legal consequence should follow in equity.

As to the effect of the evidence, that of the Plaintiff exclusively affords material ground for the conclusion, that the executor was intended to take the residue for his own benefit. The original intention, merely to provide for his friends, became afterwards extended to the farther object of excluding his next of kin. Scott's evidence is decisive, that the legacy to Sanford was not given for his pains and trouble in the office of executor : the testator, when giving the legacy, having no intention of making him executor ; which was the consequence of Scott's suggestion afterwards. To exclude him,

the legacy must be connected with the appointment of executor. If by a Will a legacy is given to a person, who by a codicil, made some years afterwards, is appointed executor, he would take the residue; though certainly there is no authority for that. The ground, always resorted to upon this question, the inconsistency of giving part and the whole, does not apply to such a case. So also, if by a previous Will he was appointed executor, having a legacy by a subsequent codicil, he would be entitled to the residue. In whatever way the appointment of executor is made, and the legacy given, if they are not connected, but distinct, the implication, that the legacy is intended as a compensation for executing the office, cannot arise. The result of the Plaintiff's evidence is, that the testator, when giving these legacies to Mr. Sanford, had no intention of appointing him executor.

The circumstance, relied on, that the testator intended [\* 447] \* to make Scott also an executor, and could not mean to give him half the residue, is by no means clear. The testator certainly intended a benefit to him; and considered him as one of his most intimate and confidential friends. The conjecture is not reasonable, that the extent of his intended bounty to him might have been reduced by his declining the office of executor; and that the testator, displeased by that, did not think proper to undeceive him; and to inform him that the office, though it might be attended with trouble, would also be very beneficial. The testator appears to have been made acquainted with the law upon this subject; that, if he did not guard against it by a disposition of the residue, his next of kin would take it: a consequence, to which he felt extreme aversion; and with that knowledge he made the subsequent declaration to Miss Sanford, that he had "settled *all* his personals:" an emphatical, decisive, expression, that he was not intestate as to any thing; incapable of any explanation, but that he had by appointing an executor disposed of all his personal property; and Hutton's evidence is equally clear and decisive to the same point. It was not necessary in that instrument, under which Sanford would by the appointment of executor take the residue, to make an express disposition of it.

The observations as to the danger of parol evidence, and of misapprehension from the various shades of expression, the probable change, and different interpretation, of terms, would be well applied upon the question as to admitting evidence: but that question has been long settled: the Court must take the evidence, as they find it; and, weighing the evidence, must recollect, that the witness may deviate by softening, as well as by heightening, the expression. The clear result of this evidence is, \* that the testator meant by the appointment of an executor to exclude his next of kin.

Mr. Richards, in reply.—The next of kin, like the heir at law, do not require evidence of intention in their favor. The Court has never inquired, whether there was any connection between the ap-

pointment of executor and the legacy ; which, if given to him in the character of executor, excludes him ; without showing, that it was given by reason of his being executor, and on condition of his undertaking the office. The simple circumstance, that he has a legacy, affords evidence *prima facie*, that he was not intended to have the residue ; upon that reason, as to the wisdom of which it is now too late to inquire, that the testator, giving him some, cannot mean him to have all. At that moment, when at the suggestion of Scott he named Sanford to be his executor, it cannot be conceived, that he, or any other person, was intended to take the residue. The proposal of Scott, as a co-executor with Sanford, makes that still more improbable ; and the answer to that objection, from his intimacy with Scott, supposed to be in such a degree as to entitle him to expect half of the residue, and the effect of the testator's possible resentment at his declining the office, is unsupported by fact. The testator had no intention whatsoever about the residue ; and it is sufficiently apparent, that he did not mean his executor to have it.

The MASTER OF THE ROLLS.—My present impression is, that the weight of evidence is against the executor : but I will give it farther consideration.

\* 1811, March 15th. THE MASTER OF THE ROLLS [\* 449] [Sir WILLIAM GRANT].—There was little controversy in this case concerning the general principles, applicable to its decision. On the part of the executor it is admitted, that upon the face of the testamentary papers he stands excluded from the residue by the particular bequest in his favor. He is obliged therefore to resort to parol evidence ; in order to rebut the legal presumption from that circumstance. I have no doubt of his right to resort to such evidence ; for, as to the argument from the exception of the plate out of the bequest to him, I do not think there is any weight in it. Every specific bequest is limited in its nature ; and excludes whatever it does not contain ; and there is no material difference between limiting an extensive description by an exception and giving at once a more limited description. In the case of *Nourse v. Finch* (1), where legacies pecuniary and specific were given to the executrix, there were exceptions out of the specific legacies : but no stress was laid upon that circumstance either in the argument or the decision.

In this case the codicil of September 1808, affords no strong inference as to the actual intention. The question might be uncertain, whether the benefit of a contract would pass to the executor without being specifically mentioned ; and the direction to pay out of the timber was a substantive and distinct advantage, which neither the executors, nor the residuary legatee, could, as such, have had. The parol evidence being admissible, the question is upon its effect.

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(1) *Anle*, vol. i. 344 ; *Hornesby v. Finch*, ii. 78 ; see the note, i. 362.

If the case rested entirely upon that, which has been produced by the executor, I should think it at least doubtful, whether it could be considered as conclusive in his favor. In all the cases of [\* 450] \* this kind, that I recollect, there has been evidence of declarations of direct intention in favor of the person appointed executor. Here it is left to be collected by inference and deduction from such declarations as these ; that he had disposed of his personal property ; or had settled all his personals ; which it is said, he had not done in any other way than by appointment of an executor ; and therefore he must have conceived himself to have made a disposition in favor of his executor by such appointment.

As to the declaration, proved by Mr. Hutton, with regard to the reason of giving legacies to the next of kin I cannot lay stress upon it ; as I do not distinctly understand its meaning and import. It is however unnecessary to say, what would be the effect of this evidence, standing by itself. Parol evidence being admitted on both sides, I must consider the result of the whole, taken together. The evidence for the Plaintiffs supplies us with a detailed history of the testator's views and intention with regard to the disposition of his property. At first he seems to have had little other anxiety than to insure to particular persons the enjoyment of particular portions of it ; without much caring, or considering, what was to become of the remainder. From the period of the conversation with Mr. Hole he appears to have conceived the design of making a general arrangement of his affairs by a regular and formal Will ; guarding at the same time against the contingency of his death, before it was finished, by giving particular legacies by testamentary papers, which were afterwards to be incorporated into that formal Will. Mr. Hole furnished him with the sketch of such a Will. That sketch, which was approved and adopted by him, specified the purpose, for which it might be proper to appoint executors : viz. that of discharging the duty, belonging to such an office ; adding, that he [\* 451] \* might appoint such persons to be his residuary legatees, or not ; as he might think proper. Any person, employed to draw a Will from this sketch, would of course introduce a residuary clause, as well as a nomination of executors : as the Solicitor afterwards did. I believe, it to be true, that from this time he had resolved to make such a disposition of his residue as should exclude the claim of his next of kin : but I cannot collect from the evidence, that he meant to attain that object, or conceived it to be attainable, by any other mode than that, pointed out by the sketch, an express disposition of the residue.

The intention to exclude the next of kin by a residuary bequest, which would also exclude the executor, in the character of executor, from the residue, cannot turn the scale in favor of the latter ; as was decided by Lord Hardwicke in *The Bishop of Cloyne v. Young* (1). When the testator proposed on the 28th of May, to

make some specified and particular alterations in the paper of the 27th, he clearly had no thought of introducing this projected residuary clause into that instrument. He did not even intend to nominate an executor. That was suggested to him by Mr. Scott; and the proposition, made by the testator to appoint him one of the executors, with the qualification, if he had no objection to it, appears to me a very strong circumstance, to show, that he had no conception whatever, that the nomination of executor would include the disposition of the residue. There is no reason to believe, that the testator, whatever regard he might have entertained for Mr. Scott, ever had it in contemplation to appoint him a residuary legatee.

\* Scott according to the evidence declines being executor ; telling him, that one executor will be sufficient to carry into effect the purpose of that paper: thus giving him the same conception with regard to the purpose, for which an executor was to be appointed, as Hole's paper had already done; and nothing drops from the testator, showing that he entertained any different notion as to the effect of appointing an executor: nor is it very likely, that he should have taken up an opinion upon it, different from that, which the communications from those two gentlemen had a tendency to impress upon his mind; considering, that he relied chiefly on their advice as to testamentary matters.

It was argued, that the circumstance of his giving Mr. Sanford this legacy, before he conceived the design of appointing him executor, prevents the presumption arising in this case, that is usually deduced from a legacy to an executor. That circumstance certainly shows this; that the testator did not give him the legacy in the character of executor; and therefore did not intend it to be for his care and trouble in fulfilling the objects of the Will: but it shows no more; and supposing that would have any effect in another case, yet in this case the same evidence, which introduces the fact, shows, in what light he considered the appointment of an executor, viz. as the imposition of a burthen on his legatee; and not as a gift of the beneficial interest.

The evidence of intention however does not stop here. It is to be recollectcd, that, when he signed this paper, there was in preparation, by his direction, a Will: which was according to Hole's plan to contain a special residuary bequest. Immediately after signing the paper the testator made an appointment to meet Scott, the next day, in order to peruse the draft. The draft was found to

\* contain, as might be expected, a bequest of the residue. [ \* 453 ] The testator dictates to Scott the names of the residuary legatees; for which a blank had been left; and likewise tells him how some other blanks were to be supplied. As to some, Scott says, he consulted him: but as to the residuary legatees he did not. That proceeded entirely from himself. It is evident therefore, that he was prepared to find in this Will a residuary clause; and, having had abundant time for consideration, he came with his resolution

formed as to the persons, who were to be his residuary legatees. This circumstance of itself appears to me decisive of the case; as I cannot believe, that he conceived himself to have the day before made a complete disposition of the residue, and given the whole of it to Mr. Sanford by appointing him to be his executor. If he had ever brought his mind to give him the whole, it is very unlikely, that in so short a time he should so far alter his purpose as to take from him one half.

In the case of *Nourse v. Finch* (1), a similar circumstance was held conclusive of the intention. The testator, after signing the Will, and appointing Miss Finch executrix, directed a codicil to be prepared for disposing of his residue. That instrument was found unexecuted. This was considered both by Mr. Justice Buller and Lord Rosslyn as so clearly deciding, that the testator could not by the nomination of her as executrix have conceived himself to have made a disposition of his residue, as to outweigh all the declarations, proved to have been made by him afterwards, as to his intention, that Miss Finch as executrix should take the residue; for if it be by any medium of proof sufficiently ascertained, what the actual intention was at the time of executing the Will, it is [\* 454] immaterial \* what a testator may, for any reason, have thought proper at a subsequent period to declare his intention to have been.

Upon the whole the evidence does not establish, but seems to me to disprove, any intention to give the residue to the executor. The Plaintiffs are therefore entitled to the Decree prayed by the Bill: but under the circumstances of the case the costs of the suit ought to be borne by the residuary estate (2).

1. As to the circumstances which will rebut the claim which, *prima facie*, an executor is entitled to assert to the beneficial interest in the residue of his testator's personal estate, and the admissibility of parol evidence (where no conclusive intention either way is plainly indicated on the face of the will to show, on behalf of the testator's next of kin, that the executor was not intended to take the residue beneficially; and, on the other hand, on the part of the executor, to repel any presumption which would go to exclude his legal title, and fix him with a trust; see, *ante*, note 1 to *Bennet v. Bachelor*, 1 V. 632; notes 3, 4, 5, 6, to *Nourse v. Finch*, 1 V. 344; and notes 3, 4, to *Clenell v. Leothwaite*, 2 V. 465; but that parol evidence must never be received in contradiction of the unambiguous language of a will, see note 2 to *Stratton v. Best*, 1 V. 285, and note 5 to *Druce v. Denison*, 6 V. 385, with the farther references given in those notes.

2. A specific legacy passed from the death of the testator; it vests immediately from that time: *Kirby v. Potter*, 4 Ves. 751. Such a legacy, therefore, is not liable to suffer abatement, or to be called upon for contribution, if it should afterwards appear that the testator's assets are not sufficient fully to pay his pecuniary legacies: *Roberts v. Pocock*, 4 Ves. 160: but a specific legatee is, on the other hand, subject to certain disadvantages to which pecuniary legatees are not exposed: see the notes to *Coleman v. Coleman*, 2 V. 639.

3. The proceedings in the Prerogative Court, relative to the will which gave rise to the principal suit, are reported in 1 Philim. 39, and 128. Four papers were first propounded as containing, altogether, the will; and all four were ad-

(1) *Ante*, vol. i. 344; ii. 78.

(2) Affirmed, on Appeal, *post*, vol. xix. 641; 2 Mer. 6.

mitted to proof in the first instance, but only three of them finally established. The proceedings upon the appeal from the original decree made at the Rolls, to the Lord Chancellor, are likewise reported in 2 Meriv. 6; and in 3 Meriv. 646, are reported the proceedings relative to the application of the produce of timber, directed by the testator to be cut down, and provided as a fund, to the extent of 10,000*l.*, for completing the purchase of a leasehold house which he had contracted for, and disposed of by his will. The imperfect form and nature of the testator's will led also to much litigation respecting his real estates. An action of ejectment was first brought in the name of the lessor of the heir at law, to ascertain what property was included in the devise of the testator's "estate of Ashton." Mr. Justice Lawrence, before whom the trial took place, admitted evidence on the part of the defendant, to show that the testator had been accustomed to call the whole of the estates he inherited *ex parte materna* "his Ashton estates," though several of these lay in other parishes, some of them ten or fifteen miles from Ashton. A verdict was, upon this evidence, found for the defendant, subject to the opinion of the Court of Common Pleas, who decided, that the collateral evidence was not admissible, and awarded the *postea* to the plaintiff; see 3 Taunt. 147, 157. Another ejectment was subsequently brought, by the devisee of the testator, to try the same question: Baron Graham rejected the extrinsic evidence, and a verdict was given for the defendant, the heir at law, whereupon exceptions were tendered and sealed, but judgment was given in the King's Bench for the defendant. The question was then brought, by writ of error, before the House of Lords, where it was finally determined that parol evidence is not admissible to enlarge the effect of the terms of a will, though such evidence may be received to explain a latent ambiguity: see 4 Dow, 65-96.

## WRIGHT v. WAKEFORD.

[1811, MARCH 18.]

UNDER a power of sale with consent of parties, testified by any writing or writings under their and his hands and seals, &c. attested by two or more witnesses, the attestation, going only to sealing and delivery, held not sufficient: nor a subsequent attestation, that they also signed: but a case was directed (1), (a).

Execution of a Power is a limitation of a Use; which must arise, if at all, at the time of execution; and is as if expressed in the original Settlement, [p. 457.]

Power to be executed by a Deed, signed and sealed in the presence of witnesses; and the Deed expressed to be so executed, though the attestation appeared to be only to the sealing and delivery: signature in the presence of the witnesses presumed, [p. 458.]

Execution of a Devise under the Statute of Frauds; requiring signature by the devisor in the presence of three witnesses, and their attestation of his act by their subscription, [p. 458.]

Attestation of a devise by a mark good within the Statute of Frauds (b), [p. 459.] Sealing not necessary to the execution of a Devise under the Statute of Frauds; nor sufficient without signing (c), [p. 459.]

Sealing and delivery essential to a Deed; which, if delivered, may be a good Deed, whether signed or not (d). If to be executed under a Power, with signature and sealing, both are required, [p. 459.]

THE Bill prayed the specific performance of an agreement for the sale of an estate. An objection was taken to the title under the following circumstances.

By indentures of lease and release dated the 10th and 11th of June, 1776, previous to the marriage of Thomas and Mary Wood, a considerable part of the premises, agreed to be purchased by the Defendant, was limited to Edward Bacon and Robert Hudson, their heirs and assigns, to the uses and subject to the powers and provisions, after mentioned; and it was among other things provided, that it should be lawful to Bacon and Hudson, and the survivor of them

(1) See the note, *post*, 460.

(a) It is the plain and settled rule, that the conditions annexed to the exercise of the power must be strictly complied with, however unessential they might have been, if no such precise directions had been given. They are incapable of admitting any equivalent or substitution; for the person who creates the power has the undoubted right to create what checks he pleases to impose, to guard against a tendency to abuse. The Courts have been uniformly and severely exact on this point. 4 Kent, Com. (5th ed.) 330; *Hawkins v. Kemp*, 3 East, 410; *Bloomer v. Waldron*, 3 Hill, 366; *Ives v. Davenport*, 3 ib. 373.

(b) This rule is recognized and admitted in *Baker v. Deming*, 8 Adolph. & Ellis, 94; *Adams v. Chaplin*, 1 Hill, Ch. 266; 9 Laws, R. 512; *Chaffee v. Baptist M. C.*, New York, Chancery, January, 1843, 4 Kent, Com. (5th ed.) 514, note (d).

A witness may attest the execution of a will by signing the initials of his name. *Adams v. Chaplin*, 1 Hill, Ch. 266.

See farther as to the attestation of wills, *ante*, note (a) *Ellis v. Smith*, 1 V. 11; also note (a), p. 12.

(c) See 4 Kent, Com. (5th ed.) 513-520.

(d) A deed is an instrument in writing, upon paper or parchment, between parties able to contract, and duly sealed and delivered. Co. Litt. 35b; 4 Kent, Com. (5th ed.) 452.

What are the requisites of a seal and of delivery, see 4 Kent, Com. 452-453.

and his heirs, at any time or times with the consent and approbation of Thomas Wood the elder and Thomas Wood the younger, or the survivor of them, testified by any writing or writings under \*their and his hands and seals or hand and seal, attested by two or more credible witnesses, to make sale or dispose of and convey, or convey in discharge for or in lieu of other manors, &c. all or any of the hereditaments therein mentioned (being a considerable part of the purchased premises). [\* 455]

By indentures of lease and release, dated the 3d and 4th March, 1788, Bacon being then dead, reciting, that Giles Stibbert with the consent of Thomas Wood the elder, and Thomas Wood the younger, testified by their being parties to, and signing, sealing, and delivering, the said indenture, had contracted with the said Robert Hudson for the absolute purchase of the premises in fee-simple, it was witnessed, that in consideration of 15,988*l.* to Robert Hudson paid by Giles Stibbert, with the consent of Thomas Wood the elder and Thomas Wood the younger, testified as aforesaid, the said Robert Hudson with the consent and approbation of Thomas Wood the elder and Thomas Wood the younger, testified as above mentioned, did in pursuance and execution of the said power for that purpose contained in the said indenture, and all and every other powers and authorities, bargain, sell, &c. unto Giles Stibbert, his heirs and assigns.

The objection was, that, though these indentures were signed, sealed, and delivered, by Hudson and the two Woods, the memorandum of attestation of the execution was indorsed in the following words :

“ Sealed and delivered by the within-named Robert Hudson, Thomas Wood, sen. and Thomas Wood, junr. in the presence of Charles Bicknell, Chancery Lane. George Burley, Lincoln’s Inn.”

\* After the death of Thomas Wood the elder, another [\* 456] memorandum was indorsed, dated the 13th of November, 1810, signed by the same witnesses, in the following terms :

“ We do hereby attest and certify, that the within written indenture at the time of the execution thereof, as above attested, was signed, as well as sealed and delivered, by the several parties within named in our presence : as witness our hands.”

A Motion was made, that the Defendant may be ordered to pay into the Bank, the residue of the purchase-money.

Sir Arthur Piggott and Mr. Bell, in support of the Motion, insisted, that upon principle, as well as upon the authority of *M’ Queen v. Farquhar* (1), this power was sufficiently executed. The witnesses were merely required to attest : the parties contemplated only the usual form of attestation : and the writing, not the signing, is to be attested. The cases upon the Statute of Frauds, as to Wills (2),

(1) *Ante*, vol. xi. 467.

(2) Stat. 29 Char. II. c. 3. See *Ellis v. Smith*, *ante*, vol. i. 11; and the references.

upon which it was at one time held, that sealing was equivalent to signing, may afford some illustration of this question. In *Croft v. Pawlet* (1) a devise was established; though the attestation did not state, that they signed in the presence of the testator. Admitting, that any substantial circumstance, required by the power, must attend the execution, enrolment, for instance, as attornment, livery of seisin, &c. were essential by the Common Law, this power is substantially well executed; and the admission of such nice [\* 457] and critical \* objections would be attended with great danger, and the most extensive and pernicious consequence to titles, now existing under the execution of powers. The words of this power are not confined to precedent consent and approbation; and then the objection is cured by the subsequent attestation.

Sir *Samuel Romilly*, Mr. *Hall*, and Mr. *Preston*, for the Defendant, opposed the Motion.

The Lord CHANCELLOR [ELDON].—Taking it to be necessary, that there should have been an attestation of the act of signing, and that, not being mentioned, is not to be considered as included in the attestation of the sealing and delivery, if this case is to depend upon the question, whether an attestation, not contemporaneous, but subsequent, would do, I have a very strong opinion, that a subsequent attestation would not do; upon the ground, that, where a deed of this sort gives a power, the execution of that power is a limitation of a use; and, unless the use arises at the time, when the power is executed, upon ordinary principles it does not arise at all. That the execution of a power is the limitation of a use is demonstrated in the ordinary case of jointure; or a lease, granted under a power: the instrument proceeding to express, what is implied in law, that upon execution of the power the estate or interest created arises; as if it was expressed in the original settlement. If however many titles depend upon it, I should wish this question to be discussed at law.

This deed certainly raises a question, not in any degree decided by *M'Queen v. Farquhar*; which I think is rightly decided. That was the case of powers, to be executed in the presence of [\* 458] witnesses; and, in one instance \*with this farther requisite expressed, to be attested by witnesses. The power, actually exercised by the deed, upon which the question arose, was to be exercised in the presence of witnesses; but was not required expressly to be attested by witnesses. The deed, said to be in execution of the power upon the face of it, was expressed to be executed in the presence of the witnesses; and so far from determining, that attestation of the sealing was an attestation of the signing, I merely said, there would be a miscarriage in a Judge, if he did not direct the Jury to presume, that the deed was signed, as it professed to be, on the face of it, in the presence of the witnesses, who attested

the sealing and delivery: a way of putting it, that so far from deciding, expressly avoided, the question, whether attestation of the sealing and delivery is to be taken as attestation of the signing also.

I do not agree with the proposition, that the writing is the thing to be attested. In the case of an execution by Will of a power in the ordinary words, "by his deed, sealed and delivered in the presence of two or more credible witnesses, or by his last Will attested, &c." it is not the Will, that is attested; but the act of the testator; and that necessary act is to be found in the Statute of Frauds (1); requiring, not merely that the instrument shall be executed by the testator in the presence of the witnesses, but that it shall be attested and subscribed by them. Two acts are therefore required: one, that he shall subscribe in their presence; the other, that they shall attest, that he has done so.

It is true, at one time it was decided, that sealing was signing (2); and when it was urged, that the Legislature meant more

\* than sealing, first, from the circumstance, that sealing is [\* 459] not mentioned as to Wills: secondly, as the Legislature must have proposed some evidence from the hand-writing of the party, the objection was, that a person may sign by his mark; an act affording no material testimony; and upon such reasoning it was decided originally, that sealing was signing: but upon a review of that the contrary has been held for a long time; and, so far is sealing from being equivalent to signing, that it is determined, that sealing is not necessary; and that sealing without signing is not a sufficient execution of a Will (3): the converse holding as to a deed; which cannot be without sealing and delivery: if signed, it may be a writing: but, if delivered, it may be a good deed, whether signed, or not, and, if it is to be executed under a power with signature and sealing, both are required.

Assuming then that the deed, in order to be a good execution of the power, must be a writing, not only sealed and delivered, but also signed, if it is required, that both should be attested, and attestation is required of two acts in their nature different: and, if a signature is actually found at the bottom of the deed, and the Jury will find that act, as done in the presence of witnesses, I do not say, that would not do; but, if attestation at the time is required, it cannot be presumed, where there is no signature; though the signature, which is there, may be presumed to have been in the presence of witnesses; not appearing to be so. If therefore the real meaning of this power is, that there shall be an attestation upon the instrument, of the signing as well as the sealing, and there is \* upon the instrument no such attestation, it is not a case [\* 460] for the presumption of a jury, that the act was done,

(1) Stat. 29 Char. II. c. 3. See *Ellis v. Smith*, *ante*, vol. i. 11, and the references.

(2) *Lemayne v. Stanley*, 3 Lev. 1; *Warneford v. Warneford*, 2 Str. 764.

(3) See, *ante*, *Ellis v. Smith*, vol. i. 11; and that attestation by a mark is good, *Harrison v. Harrison*, *Addy v. Griz*, viii. 185, 504.

which appears not to have been done : but, as this is a case of great importance, it is a proper subject for the decision of a Court of Law.

A case was directed to the Court of Common Pleas (1).

1. UNDER a power to alter uses, the new uses will not arise except under the very circumstances prescribed for the execution of the power: *M'Queen v. Farquhar*, 11 Ves. 475: and see, *ante*, notes 2, 3, to the case just cited, for a reference to the leading authorities, establishing the several points adverted to in the principal case.

2. The proceedings in the Court of Common Pleas, upon the case directed for their opinion upon the subject of the present suit, are reported in 4 *Taunt.* 213-226. Three of the judges certified, that the power in question had not been well pursued: *Mansfield, C. J. contra.* The opinion of the majority of these judges has since been recognised as settled law, by the courts both of the King's Bench and of the Common Pleas: see *Doe v. Peach*, 2 *Mau. & Sel.* 581; *S. C. 2 Marsh.* 107; *Wright v. Barlow*, 3 *Mau. & Sel.* 515; *Moodie v. Read*, 7 *Taunt.* 361. The principal case gave rise to the statute of 54 Geo. III. c. 168 (frequently spoken of as "Mr. Preston's Act," it having been introduced by that gentleman), by which it is provided, that every deed *then already made*, with the intention to exercise any power or trust, shall, if duly signed and executed, and in other respects duly executed, be of the same validity and effect, although the memorandum of attestation express the facts of sealing and delivery only, as if a memorandum of attestation of signature, or being made under the hand of the executing party, had been subscribed by the witnesses thereto. But this act, it will be observed, is retrospective only: the attestations of all subsequent instruments of the kind in question should notice the *signing* as well as the sealing and delivery.

### THORPE v. GOODALL.

[*ANTE*, 388.]

BANKRUPT, seized for life, with a general Power of Appointment, with remainder, in default of appointment, to the heirs of his body, cannot be compelled by Decree in Equity to execute the Power for his creditors (a).

THE Lord CHANCELLOR [ELDON] pronounced the following judgment upon the demurrer in this cause (2):

The short result of the facts stated by this Bill, is, that the bankrupt was tenant for life of his share of this estate; with a power to limit it to such uses, and for such intents and purposes, as he should think proper; a general power of appointment; and the limitation, subject to that power, is to the heirs of his body; which would vest in himself: but by the execution of the power he could destroy the entail; or, in other words, he could dispose of the fee-simple without suffering a recovery. The Bill is filed against the bankrupt, having this sort of title; stating, that his assignees, who under the Statute

(1) *Moodie v. Reid*, 1 *Madd.* 516; *Doe*, on the demise of *Hotchkiss v. Pierce*, 6 *Taunt.* 402.

(a) 2 *Maddock*, Ch. Pr. 638.

(2) *Ante*, 388.

are entitled to sell his estate tail, have contracted with a purchaser; who feeling a difficulty about the title, from the effect of \* this power, the bill is filed to compel him to execute it; [\* 461] and by this demurrer he contends, that he cannot be compelled to do so.

First, I will state, what the question upon this Record is not. It is not, what is the effect of the bankruptcy upon the power; nor what would be the case between the creditors under the bankruptcy and any appointee under the power, if the bankrupt attempted to execute it (1); nor, whether this, being a power of a general nature, having no specific objects, is a power, under which the bankrupt has an interest, that would pass by the bankrupt laws to his assignee: but the question is, whether there is any Equity in this Court to compel the bankrupt to execute this power. No instance was cited, which made out the proposition, that the bankrupt, whose estate, with regard to all his interests, is vested in his assignees by the effect of laws, originally considering him as a criminal, is to be dealt with as a person having contracted to sell. Previously to the Statute (2) a bankrupt could not be compelled to suffer a recovery of his estate-tail. Though there must have been many cases, where purchasers have been afraid to take the title from the assignees, there is no instance, in which this Court has compelled the bankrupt to join with his assignees to make a title to a purchaser: to destroy a contingent remainder, for instance.

The question therefore is not, what the assignees may do without the bankrupt; whether under this power there is any interest in him, which passes to them; or whether the assignees have the power, which he had; but whether there is any Equity, authorising this Court to say, the bankrupt shall do more by executing this power, or any deed, for his creditors, than the Law has done; and, \* not being able to find any thing upon the [\* 462] subject, except what is stated to have been held by Lord King (3), that, in the case of tenant for life, with a power to charge with 100*l.*, it was merely a power, not such an interest as would pass to the assignees; in the absence of all other authority, which is a material circumstance, whatever the assignees can do, I cannot hold, that the bankrupt can be compelled by a Court of Equity to join. I am the more fortified in this judgment by the circumstance, that all the acts of insolvency, with the improvements introduced from time to time, give express authority to the persons, taking the estate, to execute all the insolvent's powers, of charging, leasing, &c. Not being called upon to say, what is the effect of the Statutes upon any power the bankrupt may have, but merely, whether he shall be compelled in a Court of Equity to execute his power, re-

(1) Doe, on the demise of *Coleman v. Britain*, 2 Barn. & Ald. 93.

(2) Stat. 21 Jam. I. c. 19, s. 12.

(3) 2 Ves. 3, in *Lord Townshend v. Windham*.

taining the opinion I expressed, that he cannot be compelled to do so, I must allow this Demurrer (1).

SEE, ante, the notes to S. C., 17 V. 388.

### CURRIE v. PYE.

[1811, MARCH 23; APRIL 26.]

**DEVISE** of real and personal estate in trust for debts and legacies void under the Stat. (9 Geo. II. c. 36,) as a charge of Charity Legacies upon the real and leasehold estates, and money on mortgage: but on a deficiency of assets the other legatees preferred to the heir.

In a Charity Cause Costs as between attorney and client to the heir, making no improper point.

Double legacies, though of equal amount, with circumstances of difference, as in the times of payment of annuities, half-yearly and quarterly, accumulative; not, if exactly similar; though by different Instruments (a).

Devise in trust to pay several persons 1000*l.* each; on the death of any in case of a deficiency the others abate; but if to pay debts and legacies, and one legatee dies, the trust is for the other legatees, if necessary, [p. 466.]

Effect of the distinction upon a legacy to a person by name, or by the description of Executor: in the latter case he takes in that character, with all the consequences, [p. 466.]

CHARLOTTE SUSANNAH BEARD by her Will, dated the 12th of February, 1802, and duly executed for passing real estate, gave all her real and personal estate, not specifically bequeathed, [\* 463] to the Plaintiffs; upon trust \* to sell the real estate; and to stand possessed of the produce and of her personal estate upon trust to pay all her debts; and, subject to the payment thereof, in trust to pay the annuity, aforementioned, and also such other annuities, legacies or bequests, as she had given, or might hereafter give, by any codicil to her Will, or any memorandum or loose paper, or any pocket book, either written in her own hand-writing, or signed by her. She then gave to the Defendant Sarah Pye an annuity of 20*l.*, payable half-yearly during her life; and, subject to the payment of the said annuity and any others she might hereafter give, as aforesaid, she directed her trustees to stand possessed of all the residue of her personal estate and the produce of her real estate (also subject as aforesaid) to and for the benefit of such person and persons and for the several uses, intents, and purposes, as by any codicil to her said Will, or by any memorandum, or loose paper, or any pocket book, &c. she might appoint.

The testatrix left also two papers in her own hand-writing; which were proved with the Will. By the first, which was signed by her, and dated January the 29th, 1801, after giving to Ann Peers of the

(1) See the note, ante, 394.

(a) 2 Williams, Exec. 925; ante, note (a) *Moggridge v. Thackwell*, 1 V. 464.

city of Chester, spinster, a legacy of 1000*l.* for her own sole use, she proceeded thus :

" To Dr. Currie of Chester I give and bequeath 1000*l.* with thanks for his goodness to me. To public and private charities I give and bequeath 1000*l.* to be paid annually under the above-mentioned Dr. Currie of Chester's directions. — — — To Dr. Currie of Chester I give and bequeath my uncle Beard's pictures."

The other paper began thus :

" 800*l.*

" Dr. Currie,

" Ann Peers,

" Henrietta Trafford,

" Four Miss Leighs,

\* " 1000*l.* to Dr. Currie, together with my uncle Beard's [\* 464] picture and the whole of my plate : to Ann Peers of Chester 1000*l.* for her life. After her decease I bequeath this 1000*l.* to Henrietta Trafford," of, &c. " with an annuity for life upon it payable to Sarah Peers, sister of the aforesaid Ann Peers, of the said city of Chester, spinster ; likewise the whole of my household goods and my father's pictures : to Susannah Leigh, Ann Leigh, Henrietta Torne, and Jane Leigh, daughters of John Leigh, the sum of 2000*l.* : the whole of the rest of my real and personal estate, I bequeath to Susannah Leigh, wife of John Leigh," and to some other persons, in a very confused manner : " to Sarah Pye, of Newcastle, my father's old servant, I bequeath 20*l.* a year during her natural life, to be paid her in quarterly payments : to the poor of Chester I bequeath 1000*l.* for ever and for ever to be distributed annually under the direction of Dr. Currie, of Chester :" then, after another legacy, she added, " I recommend my old servant Joseph Hazlehurst and his wife Elizabeth Hazlehurst, of the city of Chester, as particular objects of that my voluntary contribution : I likewise bequeath to Joseph Hazlehurst thirty guineas."

On the 28th of February, 1809, a Decree was made at the Rolls ; declaring, that by the charitable legacies the testator meant to bequeath two legacies of 1000*l.* each ; but so far as they are charged upon the real and leasehold estates, and such part of the personal estate as is out upon mortgage, they are void under the Statute (1) ; and that John Beard, the heir at law, is entitled to such part of the real estate, or of the money to \* arise by sale [\* 465] thereof, as would have been applied in satisfaction of the said two legacies ; in case they had not been void ; except there shall be a deficiency in the funds, provided by the testatrix for payment of her other legacies ; in which case the consideration was reserved, how the said part of the real estate, or the money to arise by sale thereof, shall be ultimately disposed of ; and it was declared, that such part of the leasehold estates, or of the money to arise by

(1) Stat. 9 Geo. II. c. 36. See, *ante*, *Pickering v. Lord Stamford*, vol. ii. 272, 581 ; iii. 312, 492, and the note, ii. 284.

sale thereof, and the said money due upon mortgage, as would have been applied in satisfaction of the said charity legacies, if they had not been void, will form part of the funds, provided for payment of the other legacies.

The Decree declared the Plaintiff Currie entitled only to one legacy of 1000*l.* (1); together with the picture of the testatrix's uncle Beard, and the whole of the plate: that the Defendant Sarah Pye is entitled to two annuities of 20*l.* for life; and Ann Peers to 1000*l.*, for her separate use, and to the interest of another sum of 1000*l.*, for life, and the household furniture, and the pictures of the testatrix's father.

The cause coming on for farther directions, the question was, whether the proportion of the fund, produced by the real estate, which would have been applied in satisfaction of the charity legacies, should go to the heir; or to supply the deficiency of assets for the other legacies.

Mr. Richards and Mr. Bell, for the heir, cited the case of *Arnold v. Chapman* (2).

[\* 466] \* Sir Samuel Romilly and Mr. Benyon, for the legatees, said, that case was not applicable; and that subsequent cases before Lord Northington and Lord Camden were inconsistent with it.

The Lord CHANCELLOR.—If a man devises his real estate in trust to pay several persons 1000*l.* each, and any of those persons die in his life, in case of a deficiency the others must abate: but, if the devise is in trust to pay his debts and legacies, and he gives several legacies, and one of the legatees dies, the fund is a trust for the benefit of all the other legatees, if necessary. Then is there any distinction upon a legacy to a charity? I will give an opportunity of looking into the cases, that have been alluded to.

1811. April 26th. The Lord CHANCELLOR [ELDON].—There is no case, deciding this in specie; nor any appearance of authority against the legatees, except the case of *Arnold v. Chapman* (3); which, according to Mr. Forester's note, was not intended to have the application that is now contended. I remark the particular terms of the legacy in that case, of 1000*l.* to persons by the description of executors, not by name; as, however slight the distinction, the Courts have given much effect to such circumstances. Lord Hardwicke's opinion was, that, the legacy being given to them by the description of executors, they must take it in that character; and, being personal estate in their hands as \*executors, it could not belong to them beneficially; as they insisted they were entitled. Upon the point, contended by other parties, that, as it was personal estate in their hands as executors, it might go to the hospi-

(1) See *ante, Benyon v. Benyon*, 34; and the note, vol. i 466, *Moggridge v. Thackwell*; where the principal authorities upon double legacies are referred to.

(2) 1 Ves. 108.

(3) 1 Ves. 108.

tal, Lord Hardwicke's opinion was, that if it acquired its personal nature, not during the testator's life, but by the operation of his Will, and was on that account alone to be given to the hospital, the Statute (1) would prevent it.

The next of kin contended, that it was given so, that the executors must take it as executors; that it was personal estate in their hands undisposed of; and therefore the next of kin were entitled: but Lord Hardwicke's opinion was against that claim: the testator having no intention of converting it into personal property, except for the purpose of the charity; and it was admitted, that there was personal property sufficient for all the legacies; if therefore it was to go to the executors, as part of what was not disposed of, it must be intended for the hospital under the devise of the residue of the real and personal estate; and that intention, being for a charity, could not be established; but it is remarkable, that it was admitted, that, if the other personal estate had been insufficient for the debts and legacies, there was no dispute, that, as far as that deficiency went, the bequest would have been good; but no farther; and it was then argued, that the intention was not to be collected from the event, that at his death the personal estate was sufficient for the legacies without that sum of 1000*l.*; but that was given subject with the other personal property to all the legacies; and therefore is the fund for them.

That case therefore does not oppose an objection to my opinion, that this testatrix, having converted all her real \* and personal property into an aggregate fund, the whole liable to [\* 468] every legacy, has made the produce of her real estate, where it is not well disposed of, liable to all legacies, well given; as by the general law, personal estate, forming an interest in land, is liable to all legacies, except those given to a charity. This is therefore liable to the legacies.

Costs, with reference to the question upon the charitable legacies, were given to the heir, as between attorney and client: the Lord Chancellor observing, that it was frequently done in a charity cause: the heir not having made an improper point (2).

1. CHARITABLE legacies, which the testator has directed to be paid out of the produce of mortgage securities, or any of the real interest arising out of or charged upon land, are void under the statute of Mortmain: see *ante*, note 4 to *Grieves v. Case*, 1 V. 548.

2. As to the value of the distinction between a gift to persons by the description of "executors," or a gift to persons who are the testator's executors *by their names*, see note 3 to *Griffiths v. Hamilton*, 12 V. 298.

3. With respect to the cases in which a resulting trust arises in favor of a testator's heir at law, see notes 2, 3, 4, 5, 6, 10, to *Kidney v. Coussmaker*, 1 V. 436; but, where a testator has blended all his real and personal estate together, as one fund, the produce of his real estate will, on a deficiency of the personal assets, be chargeable with all legacies well given: *Bench v. Biles*, 4 Mad, 188.

(1) Stat. 9 Geo. II. c. 36.

(2) Beames on Costs, 25, 98.

4. As to the doctrine with regard to accumulative legacies, see note 3 to *Moggridge v. Thackwell*, 1 V. 464; and as to the payment of costs of suits respecting charities, see note 10, to the same just-cited case. An heir at law, contending for his inheritance upon probable grounds, whether as plaintiff or defendant, is never made to pay costs, though he may be unsuccessful: *Shales v. Barrington*, 1 P. Wms. 482; *Leman v. Aie*, Ambl. 163. Indeed, where an heir at law is made defendant, he is very rarely refused his costs: *Humphrey v. Morse*, 2 Atk. 408; and if the object of the suit be to prove and perpetuate the testimony of the will, the heir will be entitled to his costs, notwithstanding he has entered into cross examination of the plaintiff's witnesses. The question might assume a different shape, if the defendant had examined witnesses of his own: *Bidulph v. Bidulph*, 2 P. Wms. 285. And, where an heir at law is plaintiff, and it appears that his suit has been merely vexatious, he will be made to pay costs: *Seal v. Brownton*, 3 Brown. 215; *Webb v. Claverden*, 2 Atk. 424; *Luxton v. Stephens*, 3 P. Wms. 374.

### KINGSLEY v. YOUNG (1).

[ROLLS.—1809, MAY 17.]

**OBJECTION** by a purchaser of allotments under an Inclosing Act, that the Award of the Commissioners was not made, over-ruled: the Act, containing a clause, enabling a sale, and declaring the conveyance valid, before the Award; and, supposing the possibility of the Commissioners varying the allotments, the purchaser having full notice of all the circumstances.

THE Plaintiff, being seised in fee of an estate comprising inclosures, formerly made, and allotments, made to him under a late Inclosing Act, upon which he had entered by the direction of the Commissioners, appointed by the Act, put up the estate to sale by auction; when it was bought by the Defendant: who was the tenant of the Plaintiff in possession of the estate; and knew, that it was in a progressive course of inclosure; and that the Commissioners had not made their award at the time of the purchase.

[\* 469] \* The Act contained a clause, declaring, that it shall be lawful for any person, who shall be entitled to any allotment, to be made by virtue of this Act, to mortgage, sell, demise, and dispose of, all his or her estate, right, title, or interest, therein at any time before the execution of the said award; and on a proper conveyance, mortgage, lease, assurance, or other disposition, being executed or passed of the same, every such assurance or disposition shall be good, valid, and effectual in the Law; but subject to all mortgages, settlements, and incumbrances, affecting the messuages, lands, and hereditaments; in respect whereof such allotments should be made.

The Defendant took an objection on the ground, that, until the award was made, the vendor could not make a title to any specific allotment. The vendor filed a Bill for a specific performance of the contract; and under the usual reference the Master's Report was against the title; to which Report the Plaintiff excepted.

Sir *Samuel Romilly*, Mr. *Cooper*, and Mr. *Sugden*, for the Plaintiff.—Unless the clause of this Inclosing Act, authorising a sale be-

(1) *Ex relatione.*

fore the award of the Commissioners, enables the Plaintiff to convey the legal estate, it is merely nugatory. The owners of old inclosures did not require the authority of Parliament to enable them to sell their allotments; over which they have precisely the same disposing power, as they have over their old inclosures. A Court of Equity will enforce an agreement, previous to any allotment, to sell whatever allotment the party may ultimately be entitled to; according to the case (1) referred to by Lord Thurlow in *Mortimer v. Capper*. That proves his disposing \* power; but clearly he [\*470] could not before the award convey the legal estate to the purchaser: and to enable him to do so, and for no other purpose, was this clause introduced.

The only remaining ground of objection is, that the allotments may be varied. Without an express power for that purpose the Commissioners cannot vary the allotments, after they have directed the party to enter, and fence them off. This Act, like all other particular Inclosing Acts, refers to the general Inclosure Act (2) for the general provisions. It is true, by the general Act the award is declared not to be complete, until the execution of it is proclaimed in the manner thereby directed: Sect. 35: but it does not follow, that the allotments made can be afterwards varied. By Sect. 14, it is declared, that the parties shall take their shares, *when so allotted*, in full satisfaction of their rights. By Sect. 16 the Commissioners are authorized to allot to joint tenants in severalty; and it is declared, that, "*immediately after the said allotments shall be made*" they shall be holden in severalty, subject to the uses of the undivided estate. By Sect. 19, it is enacted, that after the allotments are made, and before the award, the persons entitled may enter upon the allotments with the consent of the Commissioners; and ditch, fence off, and inclose, the allotments; and by Sect. 24, if any person neglects to do so, after being ordered by the Commissioners, the Commissioners themselves are authorized to inclose, &c. at the expense of the party so neglecting.

From these clauses of the Act, imposing upon the parties the obligation to enter and fence off their allotments, the consequence is necessary, that the Commissioners have no discretion to vary them: a power, the \* effect of which would make these [\*471] Inclosing Acts a general mischief, instead of a benefit to the land owners. No provision is made as to the expense of new fences, &c. in case of re-allotments: and throughout the Acts there is nothing pointing to a power in the Commissioners to vary the allotments: on the contrary it is assumed, that the allotment, once made, is binding. The clause (Sect. 35), points out the time, when the award shall be binding; declaring, that it is not to be binding, until the execution of it is proclaimed: and stating the reason; that it is to contain "all such rules, orders, agreements, regulations, directions, and determinations, as the Commissioners

(1) See 1 Bro. C. C. 158; *ante*, vol. vi. 24.

(2) Stat. 41 Geo. III. c. 109.

shall think necessary or beneficial to the parties." This is the ultimate power, which was intended to be reserved until the execution of the award : a power, to which, as it is for the benefit of all parties, the purchaser cannot object.

Supposing however, that the Act could be taken to authorize the Commissioners to vary the allotments, yet, as this is never done, and of course never will be done, the objection is such as this Court is not in the habit of attending to. It is not sufficient to show, that the purchaser may be disturbed ; if that appears to be a bare possibility : *Lyddall v. Weston* (1), and a late case (2), before the Lord Chancellor.

[\* 472] \* Besides the constructive notice from this public Act of Parliament, this purchaser had particular personal information, that the estate was in a progressive course of inclosure, and that the award was not made. It has been decided, that a person purchasing with only general notice of a lease is bound by all its contents : *Taylor v. Stibbert* (3). This purchaser therefore, who could, if he had liked his bargain, have compelled an execution, cannot be permitted to set up an objection upon circumstances, of which, when he entered into the contract, he was in full possession

Mr. *Wetherell*, for the Defendant, contended, that the clause of the Act referred to, enabled the party to sell ; but not to transfer the legal estate ; that, if, as it is said, the clause admitted no other construction, the Court was not bound to give it any construction ; as clauses introduced into Acts of Parliament are frequently not intended to have any operation ; that the Commissioners may vary the allotments ; and nothing is binding until the award is made.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The provision of the Act is, that the lands may be conveyed before the award ; and that the conveyance shall be valid in Law. The Act may authorize parties to do what they could not effect without it. The clause is a very reasonable one. If the parties cannot pass the legal estate, as many things may delay the award, the conse-

[\* 473] \*quence would be, that the party in the mean time could not give a good title. Supposing the possibility of the Commissioners varying the allotments, yet a party purchasing, as in this instance, with full notice of all the circumstances, must take subject to the variation, as it was inherent in the very nature of the property.

(1) 2 Atk. 19.

(2) Sugden's Law of Vendors and Purchasers, 214 ; 5th ed. 296. In Chancery, 7th September, 1803. A man articed for the purchase of an estate with some valuable mines ; and would not complete his contract, because the mines were under a common ; wherein others had a right of common : and consequently he would be subject to Actions for making shafts to work the mines. Lord Eldon, after showing the improbability of any obstruction from the commoners, said, that, in case such an Action were brought, he should think a farthing quite damages enough ; and therefore decreed a performance *in specie*.

(3) *Ante*, vol. ii. 437 ; see the note, 440 ; *Daniels v. Davison*, *ante*, 433 ; xvi. 249 ; *Hall v. Smith*, xiv. 426.

The Exception was over-ruled ; and a specific performance decreed (1).

SEE note 4 to *Cook v. Jackson*, 6 V. 12.

### BLACKBURN v. JEPSON.

[ROLLS.—1810, AUGUST 3.]

**Issue** directed to try *Moduses*: alleged variations in some of the payments appearing to be only irregularities in the collection.

As to a *Modus* of 1d. for tithe of all hay, *Quare*.

*Modus* for every garden and orchard in lieu of all tithes of all titheable matters or things arising therein, sufficiently laid without stating them to be ancient gardens, &c.; and not too extensive.

*Modus* of 4d. by each occupier, having lands, cultivated by the plough by three or more horses, usually called a plough, in lieu of all small predial tithes of all such lands so cultivated, bad for uncertainty as to the quantity of land.

*Modus* disproved by the evidence: for every cow producing a calf, 1 1-2d.; or if no calf, 1d.: the evidence proving a higher payment beyond a certain number; account of tithes decreed.

*Modus* supported by the evidence in part, not as to the rest, and capable of distinction, void *in toto*; viz. so much for every calf, up to seven proved; and different sums proved from those laid as to other numbers, [p. 478.]

THE Bill, filed by the Warden and Fellows of Christ College, Manchester, and their lessee, prayed an account of tithes against the several Defendants, occupiers of lands within the parish.

The Defendants by their Answers set up the following *Moduses*: stated to have been from the time, &c. and to be now, due and payable at Easter in each year, or \*as soon after as [\* 474] lawfully demanded, by each and every inhabitant or occupier of a house situate in the several townships, &c. (except as to the tithe of hay of some parcels of land after mentioned,) having any garden, orchard, or land, at or belonging to it, or used or enjoyed with any house, &c. and producing the several titheable matters or things next after mentioned respectively, or any of them, viz.

For every such garden  $\frac{1}{2}$ d. for and in lieu and full satisfaction of the tithes of all titheable matters, or things yearly arising therein: for every such garden and every such orchard 1d.: for all hens  $\frac{1}{2}$ d. for eggs and young: for all geese 2d.: for every cow, producing a calf within the year 1 $\frac{1}{2}$ d. for tithe of calf and milk: for every cow, not producing a calf, 1d. for tithe of milk; or, if not milked, of the keep and feed: for every colt 4d.: for every farrow of pigs 3d.; and 1d. in lieu of the tithes of all hay of every such inhabitant or occupier, having any such land, producing hay, whether more or less; except some

(1) Affirmed by the Lord Chancellor, on Appeal, *post*, vol. xviii. 207.

closes ; for which, as they have heard, other *Moduses* are payable : 4*d.* by each occupier, having any such land, cultivated by the plough by three or more horses, usually called a plough, in lieu of all small praedial tithes whatsoever of all such lands so cultivated ; and 2*d.* by such occupier, having any such land, cultivated by the plough by fewer than three horses, usually called half a plough, in lieu of all small praedial tithes.

The Defendants stated their belief, that no tithes in kind have been hitherto paid, and such sums have been paid &c. ; except, that, potatoes having been introduced as an article of cultivation in the said Parish of late years, some of such occupiers have through mistake been induced to pay compositions for the tithe of potatoes ; and except [\* 475] also, that for some time past such occupiers of land, having seven cows producing seven calves within the year, have also by mistake been induced to pay 10*s.* for the tithe of such calves ; and others, having seven cows, not producing seven calves, 5*s.* They believe other *Moduses* or customary payments are payable ; and among them for every house in the parish 1*d.* ; usually called a smoke penny in lieu of the tithe of wood ; and that such *Moduses* cover all, or nearly all, small praedial tithes, and all, or nearly all tithes whatsoever, except of corn and grain ; that they have not paid any small tithes in kind ; and in general tithes of corn and grain have not been taken in kind ; but compositions have been paid.

Mr. William Agar and Mr. Bell, for the plaintiffs.

The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—This Bill is filed by the Plaintiffs, as owners of the rectory of the parish of Manchester ; and claiming tithes in kind from the several Defendants ; who are occupiers of land within that parish. The Defendants insist on *Moduses* for various descriptions of tithes, enumerated in their Answers. The Plaintiffs contend, that the *Moduses* are not sufficiently proved in point of fact : and of some they contest the validity in point of law. With an exception, to be afterwards mentioned, I think, the evidence of the customary payments sufficiently strong to entitle the Defendants to an opportunity of establishing them in an issue. The alleged variations in some of the payments seem to be nothing more than irregularities in the collection. That however is matter of evidence to be weighed on the trial of the issues.

[\* 476] \* The *Moduses*, of which the legal validity is contested, are those for hay, gardens, orchards, and what the Defendants call a plough and a half plough. The question as to the hay *Modus* appears to me, after all the consideration I have been able to give it, to be extremely doubtful. It is said on the one side to be decided by the case of *Travis v. Oxton* (1) ; and on the other, by that of *Bennett v. Read* (2). It is not very easy to mark the precise line of

(1) 3 Gwill. 1066.

(2) 4 Gwill. 1272.

distinction between these two cases: or to ascertain, to which of them the present most nearly approaches. I conceive therefore, it will be most proper to do what has frequently been done under such circumstances; viz. to postpone the decision of the question of law; until it shall be ascertained, whether the *Modus* exists in point of fact. The extracts from the Parliamentary Survey raise a doubt, whether it has had an immemorial existence: if not, the legal question will never arise.

As to the *Moduses* for gardens and orchards, one objection is, that they are not stated to be ancient gardens and orchards. I apprehend, it is not necessary in laying the *Modus* so to state them. There are in Mr. Wood's book many instances, in which a *Modus*, thus laid, has been sent to an issue; and established. Another objection is, that the *Modus* is laid to be in satisfaction of the tithes of all titheable matters and things, yearly arising therein; which is said to be too extensive. This method of laying the *Modus* is however justified by precedent. In the case of *Gardner v. Cox* (1) it was so laid. That was a Bill for establishing *Moduses*; in which greater accuracy is required than in an Answer. One *Modus* laid was of 1*d.* for every garden in lieu of the tithes of all titheable matters arising therefrom. The Bill was dismissed as to some \* of the *Moduses*: but as to this, and some others, issues [\* 477] were directed: and I have found several instances, in which after an enumeration of particular articles of produce there have been added the general words "and all other the tithes arising therefrom;" and the *Modus* has either been sent to trial or at once established. This objection therefore ought not to prevail.

As to the plough and half-plough the *Modus* is thus laid:

"And the sum of 4*d.* by each occupier, having any such lands cultivated by the plough by three or more horses, usually called a plough for and in lieu of all small praedial tithes whatsoever, of all such lands so cultivated, and 2*d.* by each occupier having any such land cultivated by the plough by fewer than three horses usually called half a plough," in lieu of all small praedial tithes of all such land so cultivated.

I do not see, how the objection for want of certainty in this *Modus* can be got over. There is no averment, what the quantity of land is, of which a plough consists. It is not even said, that it is any known or fixed quantity whatever: but only, that what is cultivated by the plough by three or more horses is usually called a plough. This I must hold to be a bad *Modus*.

There is one *Modus* to which the objection is, not that it is bad in law, but that the evidence disproves it in the manner, in which it is laid: "and for every cow, producing a calf within the year 1*½d.* for tithe of calf and milk: for every cow, not producing a calf, 1*d.* for tithe of milk; or, if not milked, of the keep or feed."

Though it is true, there is evidence of such a payment for a cow,

it is not true, that it is the payment for every cow ; for if the number be seven, a larger sum becomes payable for each.

[\* 478] \* According to the titheing books, and the schedule, indorsed on the lease, the payment is of 5s. for every seven cows, not having calves, and 7s. for every seven cows, having calves. The witnesses differ as to the precise sum : but, I think, they almost all agree, that for seven, or more, cows the payment is higher than that, stated in the *Modus* : viz. 1d. or 1½d for each. According to the authority of *Bishop v. Chichester* (1) this is a fatal objection. There the Defendants had laid a *Modus* of so much per calf up to seven ; and different *Moduses* for other numbers, exceeding seven. The evidence supported the *Modus*, as laid, up to seven : but proved a different payment for the excess. Lord Thurlow held the *Modus* to be bad *in toto* : yet there the Defendants might have said, that the *Modus* was capable of division ; and that they had proved one distinct part in the manner they had laid it. That cannot be said here : the Defendants insisting, that no more than the 1d. or 1½d. per cow is payable, let the number be what it may ; and that it is by mistake if they had paid at a higher rate for seven or more cows. That such is the payment for any number of cows is disproved by the evidence ; and I cannot send to trial a *Modus*, disclaimed by the Defendants : viz. 1d. or 1½d. for every cow up to seven ; and stopping at that number. They deny that to be the *Modus*.

Two of the *Moduses* being over-ruled, the Plaintiffs are entitled to an account of the titheable matters, which they were intended to cover (2). As to all the rest issues must be directed ; unless the Plaintiffs choose to accept any of the payments ; as offered by the Defendants.

1. AFTER the original decree in this cause was pronounced, a petition for re-hearing at the Rolls was presented by the defendants, and such re-hearing took place in consequence, when the decree was affirmed. Meantime the plaintiffs had presented a petition of appeal to the Lord Chancellor ; and the defendants, also, when they found the Master of the Rolls adhered to that part of his decree which made against them, appealed to the Lord Chancellor ; the plaintiffs objected to having this last-mentioned appeal received, contending that a cause which had been twice heard at the Rolls ought not to be heard again by the Lord Chancellor ; but, if it was intended to be farther prosecuted, should be sent up at once to the House of Lords. The objection was overruled ; and the Lord Chancellor was of opinion, that, under the circumstances, the second appeal ought to be brought up to the first. The proceedings in this stage of the suit are reported in 2 Ves. & Beat. 360 : and see, ante, note 5 to *Waldo v. Caley*, 16 V. 206. When the cause came on for hearing, on both appeals, the defendants took a preliminary objection to the plaintiff's appeal, for want of parties ; two of the plaintiffs having died since the first hearing, and two other individuals having succeeded, by election, to their interests. The court, at first, thought the validity of this objection must turn upon the fact, whether the plaintiffs sued as a corporation, in which case there would be no defect of parties ; or whether they sued as individuals, in which case the objection must prevail. But, on farther consideration, it was held that the defendants had, by their own act, removed any objection they might have taken for want

(1) 4 Gwill. 1316.

(2) See the note, ante, vol. v. 725, upon the Appeal to the Lord Chancellor after a re-hearing at the Rolls.

of parties, the manner in which they had entitled their appeal having recognised the suit as one regularly instituted and carried on. The two appeals were therefore heard together, and the Lord Chancellor determined, that there was no ground for varying the decree made by the Master of the Rolls, except as to the hay *modus*; that *modus* his lordship held to be bad. This final determination of the suit is reported in 3 Swanst. 152-158; where the several issues directed by the Master of the Rolls are given at length.

2. The difficulty which, in the principal case, Sir William Grant felt, how to draw any precise line of distinction between the cases of *Travis v. Oxton* and *Bennett v. Read*, was again intimated by him in *Leyson v. Parsons*, 18 Ves. 175; in which case his honor decided, that an annual payment of one penny, by each occupier of lands within a parish, in lieu of tithe of *all* hay made on the lands in the tenure of such occupier, be the quantity great or small, might be alleged as a *modus*. In *Williamson v. Lord Lonsdale*, 5 Price, 36, Richards, C. B., professed, that he, like Sir William Grant, was unable to reconcile the two cases above mentioned; and the chief baron at first said, he should require the aid of an issue, before he would give any decisive opinion on the legality of a *modus* of a "plough-penny," payable by the several occupiers of lands in tillage within a parish, in lieu of all small predial tithes growing upon lands so in tillage. The decree, however, was suspended as to that point; and, finally, the issue was countermanded, and such a payment declared not to be sustainable as a *modus*. The ground of the decree appears to have been the uncertainty and fluctuation to which such a *modus* must be liable, as to the amount to be received by the parson, and the possibility that the whole of the parish might be in the tenure of one occupier; in which case, a single plough-penny would be the whole payment for the predial tithes of all the land in tillage. It must be obvious, that this reasoning would be of equal force against the soundness of the decision made in *Leyson v. Parsons*, before cited; the authority of which case must be considered as much weakened, if not overruled, by *Williamson v. Lord Lonsdale*, and by the variation finally introduced into the decree made in the principal case. Eyre, B., when delivering the judgment of the Court of Exchequer, in the case of *Bennet v. Read*, (1 Anstr. 331), expressly adverted to *Travis v. Oxton*; and declared his opinion, that "a clear line of distinction appeared upon the general statement of the two cases;" and Lord Eldon, in the principal case, said he did not think that the cases cited were contradictory to each other; but that *Bennet v. Read*, though the more recent decision, must, if it were really irreconcilable with *Travis v. Oxton*, give way to that case, which had the sanction of the House of Lords, and in which case a shifting and desultory *modus* was held to be clearly bad: see 3 Swanst. 152, 156, 158, and also *Busk v. Lewis*, Jacob's Rep. 370.

3. That, in laying a *modus* for gardens and orchards, it is not necessary to state, that they are *ancient* gardens and orchards, is established by many cases: see *Prevost v. Bennett*, 2 Price, 276.

## BARLOW v. SALTER.

[ROLLS.—1810, JUNE 3; AUGUST 9.]

TESTATRIX gave all her estate real and personal to her daughter and her heirs, and half the Navigation money for her natural life, and in case she dies without issue all to be divided between four nephews and nieces, named: the part of one only for life and to be divided between the survivors.

The limitation over too remote; there being no expression, or circumstance, to limit the generality of the words to a failure of issue at the time of the death.

As to what property it extends to, *Quære*.

The words "die without issue" have their legal signification: viz. a general failure; unless there are expressions, or circumstances, from which it can be collected, that they are used in a more confined sense (a), [p. 482.]

The word "survivors" construed "others," [p. 482.]

Though, where nothing but a life-interest is given over upon a failure of issue, it must necessarily be intended a failure within the compass of that life; where the entire interest is given over, the mere circumstance, that one taker is confined to a life interest, furnishes no indication of an intention to make the whole bequest depend on the existence of that person, when the event happens, on which the limitation over is to take effect, [p. 482.]

Devise for life, and in default of issue, to another for life; and in default of his issue, remainder over: the limitation over void as to the personal property; either as too remote; or an estate tail by implication (b), [p. 484.]

CONSTANCE VICTORYN, widow, by her Will, dated the 31st of January, 1800, made the following disposition, after giving two annuities of 50*l.* each to be paid six months after her decease by her executrix; appointed her daughter Margaret Victoryn, her executrix; and bequeathed to her said daughter in the following terms:

"All my estate real and personal of every sort and kind to her and her heirs and half the navigation money for her natural life and in case she dies without issue all to be divided between my four nephews and nieces Nathaniel Barlow of Colchester, William, Catherine, Elizabeth, all at Writtle, in the county of Essex; Catherine's part only for life; and her part to be divided between the survivors."

The testatrix died on the 28th of July, 1803; leaving Margaret Victoryn, her only child, and the four nephews and nieces, named in the Will. The Bill was filed by the nephew Nathaniel Barlow; praying, that the Plaintiff and the Defendants, the other nephew and

(a) The words *leaving*, *having*, and *without*, in demises, — "and if he shall die without leaving any issue" — "without having issue," or "*without issue*" — have acquired a technical judicial meaning, and when applied to real estate, mean an indefinite failure of issue. *Newton v. Griffith*, 1 Har. & Gill, 111; see *ante*, note (a) *Everest v. Gell*, 1 V. 286.

(b) A limitation over of personal property, after a dying under age, and without issue, was held good, the contingency not being too remote. *Jones v. Soheron*, 10 Gill & J. 187.

Courts seem inclined to support limitations, even of personal estate. See *ante*, note (a) *Rawlins v. Goldfrap*, 5 V. 440; note (a) *Douglas v. Chatmer*, 2 V. 501; note (a) *Everest v. Gell*, 1 V. 286.

Whether there can be an estate-tail in personality, see *ante*, note (a) *Fordyce v. Ford*, 2 V. 536, where some conflicting opinions are collected; also, note (a) *Rawlins v. Goldfrap*, 5 V. 440.

nieces, may be declared entitled to the produce of the sale of the real estate and to the clear residue of the personal estate upon the event of the Defendant Margaret Salter (late Victortyn) dying without issue living at the time of her death ; and praying an account accordingly. It was admitted, that there was no real estate.

Mr. Richards, Sir Samuel Romilly, and Mr. Trower, for [\*480] the Plaintiffs.—This is merely a question of intention ; whether the limitation over is after the death of Margaret Victortyn without issue, generally ; or without issue living at the time of her death. In modern times, with reference to personal estate, the limited construction has been favored ; being always the real meaning : *Nichols v. Hooper* (1). *Hughes v. Sayer* (2). *Pinbury v. Elkin* (3). *Pleydell v. Pleydell* (4). *Chamberlain v. Jacob* (5). *Keiley v. Fowler* (6). One circumstance, which occurs in this case, that the limitation over upon the failure of issue is for life, has been considered as decisive evidence of the intention of the limited construction. In *Roe, on the Demise of Sheers v. Jeffery* (7), a case of real estate, Lord Kenyon does not rely upon the word "leave."

Sir Arthur Piggott, for the Defendants.—The first words are a complete and absolute disposition of the whole of this property ; and the subsequent restriction to a life interest is confined to a specific part of it. Mr. Fearne (8), having reviewed all the cases, draws this conclusion ; that though in the limitation of personal estate, after a dying without issue, those words shall not *ex vi termini*, and without the concurrence of any other circumstance of intention, signify a dying without issue then living, even though the limitation is in the \* nature of an estate tail by implication only, yet they [\*481] shall not *ex vi termini*, when there is any other circumstance of intention, import an indefinite failure of issue, even though the limitation is in the nature of an express estate-tail ; but in either case, if the limitation rests solely on the usual extent and import of these words, the limitation over is too remote ; and therefore void ; and the whole vests in the first devisee or legatee ; but the signification of the words may be confined to a dying without issue then living by any clause or circumstance in the Will, which can indicate or imply such intention.

The question must always result to this : whether the testator intends, that, in case there shall be issue, the property shall be enjoyed by any other person ; and that intention, contradicting the legal import of the words, is not to be implied without some foundation ; as,

(1) 1 P. Will. 198.

(2) 1 P. Will. 534.

(3) 1 P. Will. 563.

(4) 1 P. Will. 748.

(5) Amb. 72.

(6) 6 Bro. P. C. 309; Fearne's Ex. Dev. edition by Mr. Powell, 326.

(7) 7 Term Rep. 589.

(8) Fearne's Ex. Dev. 371, edition by Mr. Powell, 258 ; see *ante*, *Kirkpatrick v. Kilpatrick*, vol. xiii. 476; *Everest v. Gell*, i. 286, and the note.

where the Courts have laid hold of the word "leave;" or as in *Keily v. Fowler*, the circumstance, that the property was to return to the executor. This Will has no such expression or circumstance; being merely a general devise of real and personal estate to the testatrix's daughter; with a limitation over after a general failure of her issue.

1810, Aug. 9th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—In whatever sense the word "all" in this Will is to be understood, it is equally necessary to decide the meaning of the words "in case she dies without issue:" whether they are to be construed without issue, generally, or at the time of the daughter's death. If the bequest over be too remote, it will be unnecessary to determine, what description of property is comprehended in it. It appears in some of the early cases, that the Judges inclined to hold these words to mean without issue at the death of the person named: but ever since the case of *Beauclerk v. Dormer*, (1), [\* 482] \* I think, a different rule has prevailed; and it is now settled, that, unless there are expressions or circumstances, from which it can be collected that these words are used in a more confined sense, they are to have their legal signification: namely, death without issue, generally.

The Court ought not certainly to profess to adopt one of these rules; and yet to proceed, as if the other was the right one; which however is done, when the meaning of the words is held to be narrowed by expressions, or circumstances, that do not raise any fair inference of a restrictive intention. The single circumstance in this case, relied on in favor of the restrictive construction, is, that one of the four persons, to whom the bequest over is made, is to take only a life interest in her part; which is to be divided equally among the survivors. The other three persons take absolute interests, transmissible to their representatives; who will be capable of taking at whatever period of time the failure of issue may happen. Their right even to Catherine's fourth will not depend on their being alive at her death; for the word "survivors," as here used, has the same sense as the word "others:" as has been frequently decided. The whole property goes over upon failure of issue of the daughter: whether Catherine shall be then living or dead. How then can the circumstances of giving her a life interest in her part show an intention to use the words "dying without issue" in any restricted sense? Where nothing but a life interest is given over, [\* 483] the failure of issue must\* necessarily be intended a failure within the compass of that life: but where the entire interest is given over, the mere circumstance, that one taker is confined to a life interest, furnishes no indication of an intention to make the whole bequest depend upon the existence of that person at the time, when the event happens, on which the limitation over is

to take effect. When a remainder for life has been limited after an estate tail, it never was argued, that an estate tail could not really be meant to be given, because of the improbability of intending a personal provision for one person after the indefinite failure of issue of another. The failure may happen during the life; and that chance is what is given to the remainder-man for life. So here, if Catherine shall be living, when the issue fails, she will take a life-interest; but the bequest over is still to take place, when the failure of issue shall happen, whether Catherine shall be then living, or not.

If there is any case, which has ascribed to the circumstance of a devise over for life the effect, here contended for, I must beg leave to doubt the soundness of the decision. The case of *Roe*, on the demise of *Sheers v. Jeffery* (1) certainly gives no countenance to that doctrine; as the devise over was only of life estates; and on that ground Lord Kenyon compared it to *Pells v. Brown* (2). So in *Trafford v. Boehm* (3) the ground was, that all the estates were estates for lives, and for lives only. I see by the Report, that in the case of *Boehm v. Clarke* (4) I had understood that case, not having examined it, as deciding, that, if the next limitation was for life, the devise over after a failure of issue would not be too remote; and \* said, I thought, that opinion had not been [\* 484] followed; but upon examination that case does not contain any such doctrine; but proceeds on the ground I have already mentioned. In *Boehm v. Clarke* the devise was to one for life; and in default of issue, to another for life; and, in default of his issue, remainder over. It appears, that I thought the limitation over was too remote. But I now doubt, whether the devise did not rather give an estate tail by implication. Probably the parties interested had the precaution to suffer a recovery of the real estate. As to the personal estate it made no difference, which construction was adopted.

In this case my opinion being, that there is no expression, or circumstance, to limit the generality of the words to a failure of issue at the time of the death, the devise over is too remote; and the consequence is, that the Bill, seeking an account upon the supposition, that the nephews and nieces may have an eventual interest in the property, must be dismissed.

As to the construction of the words "dying without issue," see the notes to *Everest v. Gell*, 1 V. 286, with note 2 to *Fordyce v. Ford*, 2 V. 536; and that, where the context of the will in which it is found does not forbid such an interpretation, the word "survivors" may be understood as meaning only *others*, see note 3 to *Milson v. Audry*, 5 V. 465.

(1) 7 Term Rep. 589.

(2) Cro. Jac. 590.

(3) 3 Atk. 440.

(4) *Ante*, vol. ix. 580.

## LORD MONTFORD v. LORD CADOGAN.

[ROLLS.—1810, JULY 9, 10; AUGUST 9.]

SETTLEMENT of a renewable lease in trust out of the rents and profits to pay the fines and charges of renewing; and subject thereto, for husband and wife successively for life: remainder to the first son at twenty-one.

The trustees not having renewed in the lives of the tenants for life, answerable, as for a breach of trust: though not deriving any benefit from it: liable therefore, with the assets of the tenants for life, with reference to their enjoyment, and the occupying tenant, having purchased the husband's life interest, to procure a renewal for the son: the trustees indemnified against the expense by an application of the assets of the tenants for life in the first instance; but the occupying tenant not charged in their favor.

By indentures of lease and release, dated the 28th and 29th of February, 1772, reciting an indenture, dated the 15th of January, 1772, by which the Dean and Chapter of Westminster demised to Thomas Lord Montford a house and other premises in Seymour Place, to hold to Lord Montford, his executors, administrators, and assigns, from Christmas preceding for the term of forty years, at the yearly rent of twenty shillings; and farther reciting an intended marriage between Lord Montford and Mary Ann Blake, Lord Montford assigned to Charles Sloane Cadogan and Sir Thomas Bunbury, their executors, administrators, and assigns, the demised premises, and all the estate, right, title, interest, property, benefit of renewal, term and terms of years, then to come and unexpired, claim and demand whatsoever, of Lord Montford, of, in, and to, the same and every part thereof, together with the said indenture of lease, and the full and whole benefit of the same; to hold said leasehold premises to them, their executors, &c. for and during all the residue of the said term of forty years therein to come and unexpired, and for and during all and every other term and terms of years thereafter to be granted on the renewal of said present or of any future leases of said leasehold premises, and for and during all such other term and interest as Lord Montford had or could grant of or in said leasehold premises or any part thereof; in trust for Lord Montford until the mar-

[\* 486] riage; \* and after the marriage that the trustees should, by, with, and out of, the rents, issues, and profits, of the premises, pay the rent, &c. and in the next place should, by, with, and out of, the rents, issues, and profits, of said leasehold premises, pay and discharge all such fines, costs, charges, and expenses, as should be incident to or occasioned by the renewing the said present lease or any future lease or leases of said leasehold premises, and all other costs, attending the execution of the trusts; and from and after payment of said rent and all such costs, charges and expenses, as aforesaid, and after performance of said covenants, clauses and agreements, and subject thereto, upon trust to permit Lord Montford and his assigns to receive the rents, &c. during so many years of the said present term or of any future term or terms therein as he should

live ; and after his decease, in case Lady Montford should survive him, to permit her to receive the rents, &c. for so many years of the said present term or of any future term or terms therein as she should live ; and to have the use of certain furniture ; and after the decease of the survivor that they should by mortgage, sale, or other disposition, of said leasehold premises as therein mentioned, raise such sum as should be necessary to make good the deficiency of portions, provided for younger children ; and if there should be any residue of said leasehold premises, household goods, &c. to permit the first son to take the rents, &c. of the said leasehold premises, and to have the use of the said goods, &c. until he should attain the age of twenty-one, or die under that age without leaving issue male living at the time of his death ; and in case he should arrive at the age of twenty-one, that the trustees should assign the said leasehold premises for the residue of the said present term or any such future term or terms therein, as aforesaid, and also the household goods, &c. to such first son attaining twenty-one.

\* The marriage having taken place, the trustees permitted [ \* 487 ] Lord Montford to receive the rents until his death, in October, 1799, and after his death Lady Montford received the rents. The lease was renewable at the expiration of every fourteen years ; and the first period of fourteen years expired on the 25th of December, 1786 ; and the second in 1800 : no renewal having taken place.

The Bill was filed by Lord Montford, the only issue of the marriage, against Lady Montford, the trustees, the executor of the late Lord Montford, and Lord Howe, the occupying tenant of the premises ; praying, that the trustees may be decreed to procure the lease to be renewed, and to pay the fines and expenses, attending such renewal ; or that the other Defendants may be decreed to contribute to the same according to the times the late Lord Montford, Lady Montford, and Lord Howe, were respectively in possession, or receipt of the rents.

Lord Howe by his Answer stated, that an application was made to him in 1805 by the trustees to pay his rent of 200*l.* a year to them : but, Lady Montford's Solicitor refusing to authorise him to do so, he did not pay the rent to any one. He became tenant in 1786 : and in that year purchased Lord Montford's life interest for 1000*l.* ; and after his death agreed with Lady Montford to occupy for three years at the rent of 200*l.* ; and had since continued to occupy from year to year ; submitting, that he is not liable to contribute to the renewal ; that the trustees ought to have procured a renewal ; and ought not to have permitted Lord and Lady Montford to receive the rents without retaining sufficient to pay the fines and expenses of renewal.

\* Sir *Samuel Romilly* and Mr. *Daniel*, for the Plaintiff.—Mr. *Hollist*, Mr. *Leach*, and Mr. *Trower*, for the Defendants. [ \* 488 ]

The following cases were cited : *Milles v. Miles* (1). *Nightingale v. Lawson* (2). *Stone v. Theed* (3). *Adderley v. Clavering* (4). *White v. White* (5).

1810, Aug. 9th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The proposition, that under the marriage settlement of Lord Montford it was the duty of the trustees to keep these leases renewed, does not admit a question. The lease being made the subject of a settlement, it was clearly meant, that it should be kept on foot by renewals. The trustees were to apply so much of the rents and profits as would be necessary for that purpose. They are not in so many words directed to renew : but the means being given, and the purpose expressed, there is no doubt, that they were to apply those means to that purpose. If it was not to be done by the trustees, it was not to be done at all : the tenants for life having an interest the other way ; as such an application was in diminution of their income.

Some difficulties were suggested at the bar : as to the mode of executing this trust : but clearly it was not incapable of being executed : nor was the execution prevented by any such supposed difficulty. A doubt was then attempted to be raised, whether the trustees ever accepted, or acted under, the trust : upon the circumstance, that they do not appear to have executed that part [\* 489] of the \*settlement, which has been produced. The surviving trustee does not dispute, that he acted ; and that Lord Cadogan's executors should have been under any mistake as to his acting is incredible. It is known by the case of *Cadogan v. Kennet* (6), that the trustees of Lord Cadogan brought an action very soon after the settlement, in the execution of their trust. Their trust, thus created, and undertaken, it is admitted, has not been performed. One easily gives credit to persons, of the description of these trustees, from acting only from what appeared to them humane and proper motives : they could act from no other : but that conviction, however it might operate as an inducement to the Plaintiff to forego his strict right, cannot authorize the Court to refuse to listen to his claim of indemnity on account of a breach of trust ; unless he has by his acquiescence precluded himself from insisting on that claim. It does not however appear, that he was conusant of the fact, that the renewals were not made : and therefore his silence cannot be construed into a waiver of his right.

A question was raised on the part of Lord Cadogan's executors, whether, as this was a mere personal default, productive of no benefit to his estate, his assets are liable to make compensation : but in

(1) *Ante*, vol. vi. 761.

(2) 1 Bro. C. C. 440.

(3) 2 Bro. C. C. 242.

(4) 2 Bro. C. C. 659.

(5) *Ante*, vol. iv. 24; v. 554; ix. 554.

(6) *Cowp.* 432.

*Scurfield v. Howes* (1) the trustee's estate had derived no benefit from the breach of trust ; and in *Adair v. Shaw* (2) Lord Redesdale says, " It has been the constant habit of Courts of Equity to charge persons in the character of trustees with the consequence of a breach of trust : and to charge their representatives also ; whether they derive benefit from the breach of trust, or not."

But, though my opinion is, that these trustees are answerable, they are not alone answerable. The tenants for life have acquiesced in the breach of trust, and profited by it, by receiving the whole \* rents and profits, a part of which was applicable [\* 490] to the renewals ; and it is contended that Lord Howe, having taken an assignment of Lord Montford's life interest, stands in his place ; and must answer, if Lord Montford's assets are deficient. All these parties are answerable to the Plaintiff: but I do not think, that Lord Howe is primarily answerable, as between him and the trustees. If Lord Montford has left assets, they will in the first place be applicable to make good so much of the fine as corresponds with the period of his enjoyment (3). Lady Montford is in like manner answerable for the period of her possession ; and the accruing rents during her life are liable to be impounded ; to make good the demand against her. Whatever can be got from the funds, will go in ease of the trustees : but they cannot throw any part of this burthen upon Lord Howe. They permitted Lord Montford to apply to his own use all the rents and profits ; and from compassion to his straitened circumstances abstained from performing their trust. Their charity to him cannot be at the expense of Lord Howe. They cannot contend, that it was his duty to withhold any part of the rents and profits, or the consideration, that came in place of them ; it being their intention, that nothing should be withheld from Lord Montford. Their purpose was to run the risk of not performing their duty, rather than distress him ; and they cannot say, that Lord Howe was bound to do for them what they from motives of compassion had resolved to leave undone (4).

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1. TRUSTEES of a leasehold interest, to whom a power of renewing the lease " as occasion may require, and as they may think proper," have, indeed, a certain discretion intrusted to them as to the exercise of their power, for otherwise they would be bound to comply with any unreasonable demands on the part of the lessor ; but they have not an arbitrary and capricious discretion,—they must act as appears proper for the interest of their *cestui que trust*; and they must by no means abandon the interests they were appointed and undertook to protect: *Lord Milntown v. Lord Mulgrave*, 3 Mad. 433; S. C. 5 Mad. 470. It will be no answer to a charge of breach of trust, for the trustees or their representatives to al-

(1) 3 Bro. C. C. 90.

(2) 1 Sch. & Lef. 243; see 272.

(3) *Ante*, vol. ix. 560; *Colegrave v. Colegrave*, 6 Mad. 72.

(4) On Appeal, *post*, vol. xix. 635; 2 Mer. 3. The Decree affirmed, with the explanation, that the tenants for life are to be charged respectively, not upon their actual enjoyment, but as it would have been under a due execution of the trust by renewing with a fund, drawn from the rents and profits ; with liberty to the Plaintiff, as against the assignee of his father's life estate to apply, not being otherwise paid, if he shall be so advised.

lege, that they derived no benefit from it: *Adair v. Shaw*, 1 Sch. & Lef. 272: and, though long acquiescence might, in this, as in all other cases, bar the remedy of the injured party, yet the question of acquiescence can never arise, till it has been previously ascertained that the *cestui que trust* knew the facts constituting the injury: so long as he continued ignorant of those facts, he could be guilty of no wilful *laches* in not bringing forward his complaint; *Randall v. Errington*, 10 Ves. 427.

2. Our law does not recognise, as many of the continental codes do, a right in the lessee of an ecclesiastical corporation to have a renewal of such lease: *Rushworth's case*, 2 Freem. 13; *Stokes v. Clarke*, Colles's P. C. 194. But custom has established a well founded expectation of such a preference of the old tenant, if his application be made in due time: *Randall v. Russell*, 3 Meriv. 196; *Raoe v. Chichester*, Ambl. 719; *Winslow v. Tighe*, 2 Ball. & Beat. 206; *Pickering v. Vowles*, 1 Brown, 198; *Norris v. Le Neve*, 3 Atk. 38. The proceedings upon the appeal brought in the principal suit are likewise reported in 2 Meriv. 3.

**THE ATTORNEY GENERAL v. THE EARL OF CLARENDO<sup>N</sup>.**

[ROLLS.—1810, AUGUST 17.]

INFORMATION for the regulation of Harrow School: dismissed as to the removal of Governors, unduly elected according to the Founder's Statutes; not being inhabitants: the Court of Chancery having no jurisdiction with regard to either the election, or motion, of Corporators of any description: Eleemosynary Corporations being the subject of visitatorial jurisdiction; therefore, in the case of the Crown, becoming visitor for want of an heir of the Founder, the removal of a Corporator *de facto* to be sought by Petition to the Great Seal; not by Bill or Information.

As to the effect of the time, during which the Defendants had held their offices, against an inquiry into their original eligibility, *Quare.*

As to the revenues, including the management of the estates, and the application of the income, inquiries directed; to ascertain, whether the estates are properly and advantageously managed; with a view to prospective regulation; and a lease to one of the Governors, though without fraud, set aside upon general principles, as inconsistent with his duty; charging him with the full value, if exceeding the rent reserved.

The application of the income, to purposes partly specified by the Founder's Rules, and partly left to discretion, not being in all respects agreeable to the Founder's directions, though with no improper motives, to be ascertained by a scheme; having regard, on the one hand, to the Founder's directions; on the other, to the alteration of circumstances: which might render a literal adherence to them adverse to their general object and spirit.

An alteration in the constitution of the School, with the view of reducing it to a mere parochial school, by restraining the number of Foreigners, i. e. boys not on the foundation, refused: the admission of Foreigners, without prejudice to the children of the poor inhabitants, being expressly directed; and the small resort of the latter not proved the result of abuse.

No objection to encourage attention to Parish scholars by an allowance to the Master for each. The expenditure not to be measured by the number of parish boys, who are to be immediately benefited by it; if fairly referable to the purposes of the School. A considerable allowance therefore to the Master towards repairs, and a considerable expenditure in enlarging and improving his house for the accommodation of boarders, considered upon the whole not extravagant as a benefit from the increased revenue in that shape, instead of an increased, salary: nor improper, with reference to the general advantage of the School, [p. 491.]

The course of education and internal discipline left to the Governors and Masters. The Governors being expressly authorized to alter the Founder's rules, alterations, long known and acquiesced in, presumed to have been by their authority; though the precise order does not appear. Any substantial deviation from the principle and purpose of the Institution the subject of visitatorial interposition, [p. 492.]

Governors of an Eleemosynary Corporation, even where their election might be said to be a fraud, not removed without a Petition to the Lord Chancellor in his visitatorial capacity: but Corporations, constituted trustees, have sometimes been by Decree divested of their trust for an abuse of it; as any other trustees, [p. 499.]

THIS Information, filed at the relation of several inhabitants of the parish of Harrow, on behalf of themselves and the other inhabitants, against the Governors and the Head Master of Harrow School, stated Letters Patent in the 14th year of Queen Elizabeth; establishing a foundation by John Lyon of a

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Grammar School, with one school-master and usher at Harrow for the perpetual education of children and youth of the said parish, and two scholarships at the University of Cambridge, and two at Oxford, and for the repair of certain roads: and the Statutes made by the founder, among various regulations, directed, that when any one or more of the governors, appointed by the Letters Patent, should die, the others should appoint one or more fit and discreet persons within the parish of Harrow; that the Governors should appoint a master at 20*l.* per annum; and an usher at 10*l.*; or, if so much cannot be made of the rents the surplus beyond the 20*l.*; that 20*l.* per annum should be paid to the four poor scholars at Oxford and Cambridge; and all the said places, as well of scholars in the said School, as of the said poor scholars, to have the said exhibitions in the Universities, to be indifferently appointed and bestowed by the said keepers

and governors upon such as are most meet for towardness,  
[\* 493] \* poverty, and painfulness, without any partiality, &c.;

and a meet and competent number of scholars, as well of poor, to be taught freely for the stipends aforesaid, as of others, to be received for the farther profit and commodity of the said school-master should be set down and appointed by the discretion of the Governors.

The Information stated, among various breaches of the Statutes, that five of the six Governors are not resident within the parish: that they were not duly appointed; that large sums had been improvidently laid out for repairs: that a sum of 2000*l.* had been allowed to the head master towards repairing and ornamenting his house, part of the possessions of the School; which had been greatly enlarged for the reception of boarders, taken in by him as foreigners, to be educated at the School, instead, and to the prejudice, of the children of the poor inhabitants; which house was decorated with every elegance and conveniency; and was occupied at no rent, or a very trifling one; and he was permitted to reside at that house, at a considerable distance, instead of the old School-house; where he was directed to reside; and which, if not sufficiently capacious, is directed, and ought, to be made so; that few or none of the children of the inhabitants of the parish or town of Harrow, for whose benefit the said free Grammar School was originally instituted, have been educated there: nor can they be safely or properly sent there: for though the Master and Governors do not actually refuse to admit such children, when offered, yet by taking into the School so many foreigners, to the amount of 250, or more, (which he is permitted to do by the connivance of, and without any restriction and limitation from, the Governors) who are chiefly the sons of the nobility and gentry of this kingdom, they render it impossible for such poor children to remain in the School; being constantly scoffed at

and illtreated \* by the other boys: and their lives not  
[\* 494] only rendered uncomfortable, but often in great danger;  
insomuch that parents of such children have been obliged to take them away from the School; many instances of which have

happened ; whereas by the Rules and Orders of the Charity the Master is permitted to take into the School so many foreigners only as can or may be taught without prejudice or neglect of the children of the poor inhabitants of the parish ; for whose direct and more immediate benefit the said Free Grammar School was founded.

The Information farther stated, that the habits and manners of the youths, who are admitted as foreigners, and the expensive establishments they are under, render it impossible for the inhabitants to keep their children on the same footing, and very dangerous to their future plans and prospects in life : especially as they are too apt to imbibe the extravagant and expensive ideas, as well as pernicious habits, of the young men of fortune, so admitted into the School ; that all the Governors, except the Vicar, are resident at a distance ; and a Receiver was appointed by them at a large salary ; and that the Master had received a great number of foreigners without the judgment of the Governors expressed.

The Information prayed an account of the revenues ; the removal of the Governors, not duly appointed, and the appointment of others : a reference to the Master for that purpose, and to approve a plan for the better regulation of the School, and the admission of the children of the inhabitants, &c. and generally for the establishment of the Charity.

The Defendants by their Answer stated their belief, that for many years past persons had been chosen Governors, who were not inhabitants ; that no injury had arisen from it ; and [ \* 495] they were fit persons ; denying the imputations of mismanagement, &c. They admitted, that the Master's house was part of the possessions of the School, at the distance of only eighty yards from it ; and he was permitted to enjoy it with four acres at a nominal rent ; which was considered as part of the emoluments of his office. That house being much out of repair the sum of 1200*l.* was allowed by the Governors for repairs, estimated as necessary, without the additions or alterations. It was somewhat, but not greatly, enlarged by the present Master ; to take in strangers to the parish, to board ; who are educated at the School ; but not to the prejudice or exclusion of the children of the parish. The expense beyond the 1200*l.* was defrayed by the Master ; and the distance was no hindrance to the proper education of the boys ; that all the Defendants, not actually resident in the parish, can travel to Harrow, for the purposes of the School, in two hours. They believe, but few of the children of inhabitants of the parish are educated or brought up at the School ; though there always have been several ; and now are six such ; that none such have ever been refused to be admitted, who have been offered ; and the present Masters have, and the late Master did, encourage the inhabitants to send their children : but that this is a school for classical learning ; which they submit it was the intention of the founder it should be ; and classical learning is there cultivated to a great extent with much diligence ; yet, however wise the views and intentions of the founder might have been at the

time of the foundation, when learning was at a very low ebb, that is in the opinion of those best capable of judging not well adapted, generally, for persons of low condition ; but better suited to those of a higher class, intended for the learned professions ; and such prevailing opinion has been, as the Defendants believe, the chief reason,

[\* 496] why a greater number of poor children of the inhabitants have not attended the School ; and some parents have alleged as a reason for not sending their children, that they lived far remote from the School ; and were not able to bear the expense of boarding their children in the town ; and others have objected to the expense of purchasing classical books.

The answer farther stated, that such School having been for many years conducted with exemplary diligence and attention, its credit stands very high ; and foreigners, as they are called, in the rules of the founder, i. e. sons of persons, not inhabitants of the parish, to the amount of 200 or more, have been taken into the School with the approbation of the Governors ; and many of them are the sons of nobility and gentry of this kingdom ; whom the high reputation of such School for learning and good conduct has brought thither ; that instances may have occurred, where the children of the inhabitants may have been scoffed at, and ill-treated, by their school-fellows, as may have been the case with other boys in so large an establishment ; but it has been the constant and invariable rule of the Masters to repress such conduct by all means in their power ; that they are not aware of any such instances ; and, if any, believe they would be found to have originated from other causes ; that by reason of such resort of foreigners, they have been enabled to procure Masters of much greater learning, and better qualified for the office, than they could otherwise ; that in consequence of the rank and fortune of many of the boys, sent to such School by reason of its reputation, and the mode of life they have been accustomed to, the expenses of foreigners are necessarily considerable ; though always checked by regulations, and the vigilance of the Masters : but the children of inhabitants who choose to attend the School, are put to

[\* 497] no expense whatever, except purchasing necessary books ; unless they \* choose to attend other masters, who form no part of the founder's plan ; nor can be paid out of the revenues of the School ; but who are permitted at proper times to attend ; and it is not impossible for the inhabitants to send their children to the School ; nor are there any objections to the inhabitants placing their children on the same footing as others, except such as necessarily arise, where the reputation of the masters brings boys of different fortunes and situations in life together : nor any dangers to their future prospects attending their imbibing the habits and manners of others, or expensive and extravagant ideas, except such as necessarily arise from the same cause ; and which is an unavoidable consequence of the high character of the School ; which induces many to attend it ; and this is counterbalanced by the advantage of the ability and attention of the masters, the emulation produced among

the boys, and the excitement, necessarily given to the masters, from their being placed in the management of a School, which has obtained a high reputation ; and they believe, that neither the governors, nor the masters, ever refused to admit, or endeavored to prevent any inhabitant from sending any child to such School ; nor practised, or connived at any ill-treatment or neglect of any child of any inhabitant ; on the contrary the inhabitants have been frequently invited by the masters to send their children to School ; where they have received the same treatment and education in classical learning as others ; and more children are not brought for the reasons before mentioned, and because few of the inhabitants are desirous, that their children should be educated in classical learning ; the Defendants conceiving, that this was intended as a School for teaching grammatically the learned languages ; and not for the instruction of the children of Harrow in general learning.

The Answer farther stated, that the inhabitants are not \* by the non-residence of some of the governors deprived [\* 498] of the opportunity of making complaints : one of the Defendants being always resident ; and the other governors not far distant ; and well known to most of the inhabitants.

The Defendant, the head master, admitted, that he had with the privity and general consent of the governors, though without any express leave, received many foreigners ; but not more than former masters : the present number being 230 ; insisting, that no inconvenience or disadvantage to the children of the inhabitants arises from that.

1810. Aug. 17th. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—This Information has three objects : first, the removal of such of the Governors of Harrow School as have not been duly elected : secondly, the better administration of the revenues of the Charity : thirdly, an alteration in the present constitution of the School.

The first of these objects is prayed upon the ground of those governors not having been inhabitants of the parish at the time of their election. By the Letters Patent of Queen Elizabeth the governors are constituted a body corporate. This Court, I apprehend, has no jurisdiction with regard either to the election or the amotion of corporators of any description. Eleemosynary Corporations are the subject of visitatorial jurisdiction ; and where, for want of an heir of the founder, the Crown becomes the visitor, it is by petition to the Great Seal, and not by Bill or Information, that the removal of a governor, from the corporate character, which he *de facto* holds, is to be sought. This was the course \* pursued in the cases [\* 499] of Grantham School and Richmond School ; and even in *The Attorney-General v. Dixie* (1), where the election of governors might be said to be a fraud upon the Court, the Lord Chancellor declined proceeding to their removal, until a petition was presented to

him in his visitatorial capacity. Corporations, constituted trustees, have indeed sometimes been by Decrees of the Court divested of their trust for an abuse of it; as any other trustees would have been (1). Such was the case of the Corporation of Coventry, in the time of Lord Harcourt: but that is very different from divesting a person of his corporate character and capacity. Whether any Court, or visitor, would be disposed to inquire into the original eligibility of corporators after such a length of time as the Defendants have held their offices of governors, is a point, on which it is not necessary for me to give any opinion. The Information, so far as it seeks their removal, must be dismissed.

With regard to the revenues, the Information complains partly of the management of the estates, and partly of the application of the incomes. In the management of the estates, it is said, there are deviations from the rules of the founder to the injury of the Charity; that the governors do not appoint from among themselves surveyors of the estates; that the tenants are not made to covenant to do all repairs; that the rents are not received at the School-house; but a receiver paid for collecting them.

As management, generally improper, independent of the founder's rules, it is charged, that a part of the School-[\* 500] \* estate is let to Mr. Williams, one of the governors, at an undervalue; and it is said to appear by the evidence, that several parts of the estate are let below their estimated value. The governors say, that the deviations from the strict letter of the founder's rules have not been introduced in their time; and that those deviations are beneficial, rather than injurious, to the estate. As to the few acres of land, and a barn, let to Williams, they say, they reserved the full rent, and a higher rent than was offered by any other person. On this branch of the cause I think the relators are entitled to have inquiries directed; to ascertain, whether the estates are properly and advantageously managed; with a view to prospective regulation; if any shall appear to be necessary. As to the lease to Williams, though nothing wrong with regard to it is in a moral point of view imputable either to him, or the other governors, yet according to the general rule, which this Court adopts, for the purpose of guarding against possible fraud, he could not become a lessee of the lands, which, as governor, it was his duty to let to the greatest possible advantage. Therefore, if the premises are still in his possession, he must deliver them up; and he must be charged with the full value; if it should appear, that the rent he has paid, fell short of that full value.

With regard to the application of the income, it is alleged, that some of the purposes, to which it ought to be applied, are neglected; and that part of it is applied to purposes, not within the scope of the Charity. The purposes, to which, after providing for the sustentation of the School, the surplus income is to be applied, are partly

(1) *The Attorney General v. The Governors of the Foundling Hospital*, ante, vol. ii. 42; see p. 47, and the note.

specified by the founder's rules; and partly left to the discretion of the governors. As it appears, that the application of the income is not in all respects agreeable to the directions of the founder, I think, it is fit, that it \* should for the future be [\* 501] fixed and ascertained by a scheme; having due regard on the one hand to the founder's directions, and on the other, to the alteration of circumstances, that may have taken place since his time; and which may be such as to render a literal adherence to his rules adverse to their general object and spirit.

I did not understand, that the relators sought to charge the Governors personally and retrospectively for misapplication; as for an abusive application of the funds; and I am persuaded, that they have administered the revenues of the Charity to the best of their judgment; and have been actuated by no improper motives in any thing they have done, or omitted to do. There is one article of expenditure however, to which I shall presently more particularly advert: that, which regards the Master's house. It is in some degree incidental to the third, and most material, object of the suit: the constitution of the School.

In the conception of the Relators the School no longer answers the purpose of its foundation; and in that view the whole expenditure may be said to be misapplied. Considering, say they, the very small proportion which the parish boys, taught at Harrow School, bear to the other scholars, who resort thither, the income of the founder's estate is employed rather in providing for the more commodious education of the rich than in supplying a gratuitous education to the poor; and it is contended, that some measure ought to be adopted by the Court for securing to the inhabitants of the parish the full benefit, intended for them by this Institution.

We must see, in what sense it is asserted, or is true, that the inhabitants have not the full benefit of the Institution; before we can judge, whether any remedy is necessary, or practicable. It is not alleged, that there is not a commodious \* School; [\* 502] that there are not competent teachers: or that any of the children of the parish are refused admittance into the School; or, when admitted, are not carefully taught. At first sight then it seems, that the benefit of the Institution is within the reach of the inhabitants; so far as they may choose to avail themselves of it: but it is said, so many foreigners, that is, boys, not entitled as parishioners to be gratuitously educated, resort to this School, that the parishioners are deterred from sending their children to it; partly from the ill-treatment they receive from such foreigners and partly from the apprehension of their acquiring expensive habits by an association with persons of rank and fortune, superior to their own. From this statement of the evil it is difficult to conceive, what remedy it is in the power of the Court to apply. The most obvious, and the only complete one, would be the entire exclusion of foreigners. This however in the first place would be incompatible with the intention of the founder; who did not mean to erect a mere

parochial school ; but has declared, that the Master may receive over and above the youth of the inhabitants within the parish, so many foreigners, as the whole may be well taught, and the place can conveniently contain (1).

No attempt has been made to show, that this number has been exceeded. In the second place, would the parish itself gain by the conversion of this distinguished seminary of learning into a mere parish school ? It cannot be supposed, that for the present salary a man of talents would be found to fill the place of Master ; and to give him a large salary is the last method, that prudence would devise for securing diligence and exertion in the obscure sphere, to which he would be confined. As to a mere diminution and [\* 503] limitation of the number of foreigners to be \*admitted, it would not meet the evil, of which these Relators complain. I do not know, what the number is, from which bad habits may not be contracted, or ill treatment suffered : but is it really true, that it is to the alleged causes that the paucity of parish scholars is to be ascribed ? Why should Harrow be so unfortunately distinguished from the great number of Schools, in which the admission of other scholars does not in any way prevent those, who choose it, from taking the benefit of the foundation ?

Upon the whole of the evidence the existence of the alleged conspiracy against the parish boys is by no means satisfactorily made out. The number of instances of ill treatment is no greater than might in the course of years, from which they are produced, very possibly happen from personal and accidental circumstances ; while the proved existence of cases, in which no such treatment was experienced, negatives that uniform and systematic hostility to parishioners merely as such, which is alleged to prevail in this School. Several witnesses, and among them parishioners, say, the reason there are so few parish scholars is, that few of the inhabitants wish to give their children a classical education. Giving credit to all, who say, they had any disposition to send their children to Harrow School, the number of parishioners, that would have been there at one time, would be very small. I should be unwilling to take any step, that might impair the general utility of the School for the mere chance of adding a few more to the number of scholars on the foundation. In some Schools the Master has an allowance of so much per annum for every scholar on the foundation. To that mode of encouraging attention to parish scholars I can see no objection, but

[\* 504] any restriction on the number of other scholars, excepting that, which the founder himself has \*prescribed, would be neither proper, nor efficacious ; and I cannot agree to make a reference to the Master, to frame a scheme with a view to any such object.

It was said, that if the parishioners either do not wish to send their

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(1) *The Attorney General v. The Cooper's Company, post, vol. xix. 187 ; The Attorney General v. Hartley, 2 Jac. & Walk. 353.*

children to the School in greater numbers, or are prevented from doing so by causes, which the Court cannot control, the fund ought not to be applied to expenses, attending the School; but the parish should have the benefit of it in some other way. The parishioners must, I apprehend, be contented to take the benefit in the way, in which the founder thought fit to give it. The School is not to be let down, because in a given period there have been few, or even no, parish scholars sent to it. The founder has determined, that there shall be for ever kept up at Harrow a Grammar School; and he has provided funds for its perpetual sustentation. In this Grammar School parish children are to be taught gratuitously; if they choose to receive that sort of education: but the founder intended to encourage other scholars to resort to his School; and to impart to them every benefit of his foundation, except gratuitous teaching. The School must have been built of larger dimensions, and at greater expense, with a view to their accommodation. The play-ground must be calculated for the whole number. The exhibitions are not to fail, because there are no parishioners, qualified to be sent to the University. In that case other Scholars are by the express provision of the founder to have them. I can by no means admit, that the propriety of any expenditure is to be measured by the number of parish boys, who are to be immediately benefited by it; provided it is an expenditure fairly referable to the purposes of the School.

This brings me to notice the expenditure in the repairs of \* the Master's house. It is clear, that the Master was [\* 505] to be provided with a habitation at the expense of the trust. The founder states his intention to build meet and convenient rooms for the School-master and Usher. Whether any such rooms were ever built, does not appear. In one article it is directed, that the account book shall be kept in a chest in the house, that shall be appointed for the School-master. It appears, that as far back as the year 1670 an allowance was made to the Master for a house. In 1671 some assistance was given him towards fitting up his house for the better accommodation of himself and his boarders. In 1702 he had a house, belonging to the trust, given free from rent; and there are entries at different periods since that time of sums expended in repairs of the Master's house. When the present Master was appointed, the house being much out of repair, the Governors agreed to contribute 1200*l.*, payable by instalments of 200*l.* per annum, towards the repairs. That sum was not found sufficient even for those, that were strictly necessary; and the Master has himself laid out upwards of 5000*l.* in enlarging and improving the house. Thus it appears, that the Governors, instead of increasing the School-master's salary out of the augmented revenues, have given him in another shape a benefit; the amount of which upon the whole does not appear to be extravagant.

In the case of Rugby School, which was before the Lord Chancellor about two years ago, the expenditure for the benefit of the Master was much larger; yet the objections, made upon the same grounds,

that have been relied on in the present case, were not allowed to prevail. Rugby School was founded in Queen Elizabeth's time ; and was to be a free Grammar School ; at first, for the children of Rugby and Brownsover, and other places within a certain [\* 506] distance of Rugby. It became, in \* process of time, as this has, a great public school ; and the scholars, who paid for their education, greatly out-numbered those on the foundation ; sometimes in the proportion of ten to one. An Act of Parliament, 17 Geo. III. passed, relative to the Charity Estates ; among other things directing the trustees to lay before the Court of Chancery plans for the appropriation of the surplus rents. Under an Order of Reference for that purpose a scheme was laid before the Master ; by which it was proposed to add 2*l.* a year to 3*l.* before allowed to the school-master for every boy, educated on the foundation : to add to the number of exhibitioners ; and to lay out several thousand pounds in rebuilding the School-master's house ; with proper accommodation for his boarders ; and 500*l.* in repairing the other buildings. The Master reported, that he approved the scheme ; except as to rebuilding the Master's house, and the repairs, and increasing the number of exhibitioners ; stating, that he did not approve of such an application ; as, though he was of opinion, that it was proper and necessary as to both objects, yet, having regard to the size and extent of the buildings, proposed for such house and offices, and to the number and description of the masters, among whom were a French master and a drawing master, and to the number of boys educated, not more than an average of a fourth belonged to the charity ; and of the exhibitioners a third only was taken from such boys : it appeared to him therefore, that such house and buildings were calculated for receiving boys of a different description, and for a different education, than were intended either by the founder or the act ; and to the prejudice of the boys, properly entitled to the benefit of the charity ; and he did not approve the plan ; as no consideration was had for the alms-men and alms-houses ; and the trustees, though required, did not lay before him any other plan.

[\* 507] \* The Trustees presented a Petition to the Lord Chancellor ; praying that notwithstanding the Report they might be permitted to carry their plan into execution. His Lordship ordered, that the petitioners should be at liberty to carry into effect the plan or scheme for the disposition of the surplus income of the charity, so carried in before the Master ; and to pay the 2*l.* : *to raise 14,000*l.* for the purposes in the said plan mentioned* ; to enlarge the number of exhibitioners, &c. pursuant to the scheme proposed.

It is obvious, that the Lord Chancellor did not conceive an expenditure to be improper, which tended to the general advantage of the School, merely because it was not calculated for the direct and immediate benefit of the boys on the foundation.

The only part of the information, remaining to be noticed, is that, which represents the course of education and internal discipline of the School as not entirely agreeable to the rules, laid down by the

founder: but the Governors are expressly authorized to alter these rules; and such alterations as have been long known and acquiesced in, will be presumed to have been made by their authority; though the precise order for it does not appear. Whether this or that book is to be read in a particular form, whether the boys are to go to school at this or that hour, and the like, may surely be left to the Governors and Masters to determine. If there should be any substantial deviation from the principle and purpose of the Institution, the visitatorial authority may with propriety be called upon to interpose.

1. SEE, ante, the notes to *The Attorney General v. The Governors of the Foundling Hospital*, 2 V. 42, and the note to *The Attorney General v. Black*, 11 V. 191, as to the right of interference in the management of charities, which may be exercised by the Court of Chancery, even where a special visitor has been appointed by the founder.

2. Whenever the governor or trustee of a charity lets the charity estates to relations or connexions of his own, that is a circumstance calculated to excite jealous suspicion: *Ex parte Skinner*, 2 Meriv. 457. And, as to the cases in which the inadequacy of the rent reserved upon a lease of charity estates may invalidate such a lease, see the note to *The Attorney General v. Green*, 6 V. 452.

3. An endowed "free grammar school" must, *prima facie*, be understood to mean a school for *classical* instruction, but usage may have engrailed upon those words a different construction: see note 2 to *The Attorney General v. Whiteley*, 11 V. 241.

### LEES v. SUMMERSGILL.

[\* 508]

[ROLLS.—1811, FEB. 18; MARCH 25.]

LEGACY to a subscribing witness to a Will, though of personal property only, void under the Statute 25 Geo. II. c. 6; extending to all Wills and Codicils. The Preamble of an Act of Parliament, though it may assist ambiguous words, cannot control a clear and express enactment (a).

EDWARD LEES by his Will gave the residue of his property, subject to his debts and legacies; in trust for his daughter Alice Adams Lees until her age of twenty years: then to be transferred to her; and in case of her decease over. He then gave some legacies specific and pecuniary; and, among them to John Summersgill his chest of drawers, together with his book-case and books contained therein, after the before-mentioned legacies are executed and every debt discharged. He appointed John Summersgill and Thomas Lees his executors.

The Will was attested by three witnesses; of whom Summersgill was one: but there was no real estate.

The Bill, filed on behalf of the infant daughter of the testator, prayed an account of the personal estate, &c.

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(a) 1 Kent, Com. (5th ed.) 461; *United States v. Fisher*, 2 Cranch, 386; *Crespingy v. Wittenoom*, 4 T. R. 793.

The Defendant Summersgill by his Answer claimed his legacy; submitting, that it is not void by his being one of the subscribing witnesses to the Will.

Mr. Benyon, for the Plaintiff.—There is no judicial authority to be found upon the question, whether a legacy to an attesting witness of a Will, relating only to personal estate, is void by the Statute of the late King (1). The direct object of that Act being [\* 509] \* devises within the Statute of Frauds (2), the inference certainly is, that Wills of personal estate were not contemplated: but the words of the enacting clause are too clear and peremptory, comprehending all Wills of real or personal estate, to admit a construction, limited by reference to the preamble.

Mr. Toller, for the Defendant Summersgill.—Regarding the professed object of this Act of Parliament, to obviate an inconvenience, affecting devises of land by the alteration of the law, introduced by the previous Statute, the construction must be confined to Wills of that description.

This object has no reference to a Will of personal estate: a mere testament: that word not once occurring in the Act: an instrument requiring no attestation; and established merely by general evidence as to the handwriting of the testator. In Burn (3) it is expressly stated, that a written Will of personal property is not affected in this respect by the Statute; and that opinion corresponds with the understanding and practice at Doctors' Commons: the evidence of a subscribing witness, having a legacy, being uniformly rejected since, as it was before, this Statute, on account of his interest.

Mr. Benyon, in reply.—That opinion, not authorized by the Statute, cannot govern such a question. The mischief with reference to Wills of personal property, though not the precise object of the Act, is considerable. In the case of a Will, impeached on the ground of lunacy, and supported by the allegation of a lucid [\* 510] interval, how important would be the evidence of a single witness! The practice at Doctors' Commons, standing merely upon the usage of the Proctor's Office, can have no weight. The distinction is, that, if the enacting clause is liable to any doubt, the preamble may be resorted to for explanation: but the plain meaning of clear words cannot be abridged (4).

The MASTER OF THE ROLLS.—It does not strike me at present, how the express words of the Statute are to be got over: but, as this is a point of some consequence, I wish to look into the Statute.

Upon an inquiry from the Court, whether this particular witness appeared to have been examined in the Commons, the usual affidavit,

(1) Stat. 25 Geo. II. c. 6.

(2) Stat. 29 Ch. II. c. 3.

(3) 4 Burns's Eccl. Law, 105.

(4) See *Copeman v. Gallant*, 1 P. Will. 314; *Ryall v. Rowles*, 1 Atk. 165; 1 Ves. 348.

made upon taking probate by the executors, was produced ; and it was observed at the bar, that the executors are always sworn to their belief, that the instrument is the testator's Will : the entry is the same, if they are executors merely, and not witnesses ; and no further evidence is required, except in the case of a contest.

**1811, March 25th.** The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—The only question in this cause is, whether a legacy, given to an attesting witness of a Will of personal estate, is void by the Statute of 25 Geo. II. (1). The preamble of that Statute states a doubt, which applies only to Wills of land, who [\*511] are to be deemed legal witnesses within the Statute of Frauds (2) ; and for the purpose of avoiding that doubt the Statute is professedly made : but then the enacting part goes beyond that object ; and applies to witnesses, attesting the execution not only of Wills of real estate, but of "any Will or Codicil."

In these words it cannot be said there is any ambiguity. They clearly apply to every Will and Codicil ; and the preamble, though it may assist the construction of ambiguous words, cannot control a clear and express enactment. It could not escape the Legislature, particularly Lord Hardwicke, who brought in the Bill, that there might be other Wills and Codicils, besides those affecting lands ; yet the words of the enactment extend to all Wills and Codicils ; and to legacies, affecting any real or personal estate. I cannot see, how the Court can confine it to such Wills only as affect real estate.

In consequence of what was suggested at the bar, as to the understanding at Doctor's Commons, that the Statute does not affect Wills of personal estate, and the practice there, I made inquiry from those, most competent to give me information ; and I find, that there is not there any such understanding ; but on the contrary they rather understand, that the Statute does extend to all Wills and Codicils whatsoever. It is true, there is no decision upon the point ; and the consequence is, that private practisers, *ex abundanti cautela*, sometimes make witnesses release their legacies ; when it is necessary to examine them. There is also an inaccuracy in supposing, that Dr. Burn says, the Statute does not affect Wills of personal estate ; as, if the context is attended to, it will be seen, he is speaking of the Statute of Frauds, not of the Statute of 25 Geo. II. (3).

\* I must therefore hold, that the witness is not entitled [\* 512] to his legacy.

The Decree was made according to the prayer of the Bill.

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To what extent, and in what cases only, the preamble of a statute may be allowed to give a construction to the enacting clauses of the statute, see note 2 to *Mason v. Armitage*, 13 V. 25.

(1) Stat. 25 Geo. II. c. 6.

(2) Stat. 29 Ch. II. c. 3.

(3) 4 Burn's Eccl. Law, 105.

LANCESTER, *Ex parte.*

[1811, APRIL 29.]

THE Lord Chancellor refused to stay proceedings under a Commission of Bankruptcy, not opened, upon the allegation, that there was no petitioning creditor's debt : the Commission issuing of right under the Act of Parliament.

Insertion of adjudication of bankruptcy in the Gazette suspended by the Lord Chancellor upon inspection of the Proceedings : the Act of bankruptcy not being proved, [p. 513.]

THE object of this Petition was to stay proceedings under a Commission of Bankruptcy ; which had not been opened ; insisting, that there was not a petitioning creditor's debt.

Mr. Hart, in support of the Petition, said, the object in taking out this Commission would be answered by the advertisement in the Gazette ; and, where such a view is clearly made out, the Lord Chancellor would, to prevent the irreparable mischief that may be the consequence, take up the short point, whether a petitioning creditor's debt, sufficient to support the Commission, can be established ; referring to the late case *Ex parte Foster* (1).

Mr. Montague, for the petitioning creditor, opposed the Petition ; insisting, that a Commission of Bankruptcy is matter of right ; and it is settled, particularly in *Ex parte Stokes* (2), that the Lord Chancellor has no authority to interpose against the exercise of that right.

[\* 513] \* The Lord CHANCELLOR [ELDON].—In the case (3) alluded to they had been before the Commissioners : the party was adjudged a bankrupt ; and without any interposition on my part the Solicitor, or the party, took upon himself to prevent the insertion of the adjudication in the Gazette. In that state it came before me ; and upon inspecting the proceedings I found the adjudication not supported by the evidence. There is however no doubt, that any person, striking a docket, and giving the bond to the Lord Chancellor, as required by the Act of Parliament, has a right to take out a Commission of Bankruptcy ; and to have the adjudication ; if the trading, the act of bankruptcy, and the petitioning creditor's debt, are proved ; and there is no preventive remedy : but compensation must be sought, if the Commission should have been taken out without foundation, by an action on the case, or upon the bond ; if a case for assigning the bond, or supporting an action, can be established. Whether that is a sufficient recompence, or not, it is clear, that the Commission is matter of right. Consider the consequence ; if, whenever a Commission issues, the Lord Chancellor is to be called on to try, whether the case is fit to go before the Commissioners. The Act of Parliament is positive, that under particular circumstances the Lord Chancellor shall issue a Commission : but, if

(1) *Ante*, 414.(2) *Ante*, vol. vii. 405 ; see the note, 409.(3) *Ex parte Foster*, *ante*, 414.

he arrests it, before it is opened, he really does not issue the Commission under the Act of Parliament (1).

SEE notes 1, 2, to *Ex parte Stokes*, 7 V. 405.

### KENDALL, *Ex parte.*

[\* 514]

[1811, APRIL 29, 30; MAY 6, 7.]

**DISCRETION** of the Lord Chancellor to stay a dividend in Bankruptcy for the general benefit of the creditors. Not exerted, to increase the dividend by throwing joint creditors of the bankrupts and a deceased partner upon his assets in favor of creditors of the survivors only: the Equity of joint creditors against the surplus of the separate estate, though the debt survives at law, being open to equitable circumstances; upon the state of the accounts, or subsequent dealing with the survivors; which may discharge the assets; and the equitable arrangement, confining creditors to one of two funds, being admitted only in favor of creditors of the same debtor, except upon some special Equity; as in the case of drawer and acceptor, or principal and surety.

A Partner cannot claim in competition with the joint creditors, [p. 521.]

Creditors, as such, independent of special contract, have no lien or charge on the effects; but in the distribution of joint estate obtain payment through the equities of the Partners among themselves (a), [p. 526.]

THE Petition stated, that in August, 1810, a Commission of Bankruptcy issued against John Dawes, William Noble, Richard Henry Croft, and Richard Barwick, bankers; that William Devaynes had been in partnership with them up to the time of his death in November, 1809; and from that time the bankrupts continued to carry on business as before, under the firm of Devaynes, Dawes, Noble, and Co. without opening any new books, or making any rest in their accounts; and the accounts between them and the representatives of their deceased partner were not made up, when the surviving partners became bankrupts.

The Petition farther stated, that by the aforesaid mode of dealing with the affairs of Devaynes, Dawes, Noble, and Co. part of the effects, belonging to that concern, consisting of money, notes, bills of exchange, Exchequer Bills, and other property of that nature, to a large amount, came immediately on the death of Devaynes into the possession of the surviving partners; and other part thereof was from time to time between the death of Devaynes and the bankruptcy, got in by the surviving partners; and mixed with their own funds; other parts thereof remain outstanding; and on the other

(1) The Lord Chancellor will not stay the Adjudication; but upon affidavit of no Act of Bankruptcy, debt, &c. stayed the insertion in the Gazette, until the proceedings were laid before him: *Ex parte Fletcher*, 1 Ves. & Bea, 350; and in another instance until the trial of an Issue as to the trading and Act of Bankruptcy: *post, Ex parte Tarleton*, vol. xix. 464; *Ex parte Ogilby*, 1 Glyn. & Jam. 250.

(a) See *ante*, note (a) *Ex parte Rufin*, 6 V. 119; Story, Partnership, § 97, 326; 1 Story, Eq Jur. § 675.

hand the surviving partners have paid off debts of Devaynes, Dawes, Noble, and Co. to a large amount; some in full, and some [\* 515] in part: that at the time of the bankruptcy \* there were (besides creditors, who never had any dealings with the house in Devaynes's life) creditors of the following descriptions, claiming to prove under the Commission: viz. creditors, 1st, in respect of debts owing by the house at the death of Devaynes, upon which there have not been any payments since; or who have been paid in part only by the surviving partners:

2dly, By debts, owing at the death of Devaynes, which have been increased since by payments to, or dividends, interest, or other moneys received by, the surviving partners; but on which no payments have been made by either firm.

3dly, Creditors, who were such, when Devaynes died; and who continued their accounts with the surviving partners by drawing and making payments, as their occasions required: so that between the dissolution of the first partnership and the bankruptcy of the second they have drawn from the surviving partners various sums, amounting in some instances to more, in others to less than was due; but yet remaining creditors in regard that their payments have exceeded their drafts:

4thly, Creditors, who at Devaynes's death were debtors to that concern; but who likewise continued their accounts with the surviving partners; and by their subsequent dealings with them have turned the balance in their favor:

5thly, Creditors in respect of stock, standing in the name of Devaynes and Co. or one of them on account of the others, as trustees; or of India bonds, Exchequer Bills, bills of exchange, or other securities of that nature, specifically deposited with them for [\* 516] safe custody, \* or other special purposes; but which without the knowledge of the creditors have been disposed of against good faith, partly in the life of Devaynes, and partly since his death; and the money applied for the purposes of the respective firms at the times of the transactions:

The Petition farther stated, that the funds under the Commission consist of specific assets, which belonged to the partnership at the time of the death of Devaynes, and of subsequently acquired partnership effects, and of the separate effects of each of the bankrupts; and that a Bill has been filed in the Court of Chancery by certain joint creditors of the firm of Devaynes and Co. on behalf of themselves and all other such creditors for an account of the assets of Devaynes, and for a Decree to admit the joint creditors to have the benefit of his assets, after his separate debts are paid.

The Petitioners proved joint debts under the Commission: viz. George Yelverton Kendall a joint debt of 483*l.* 9*s.* 2*d.*: Philip and David Cooper 1153*l.* 14*s.*: Alexander Tullock 909*l.* 2*s.* 8*d.*: Nugent Kirkland 1927*l.* 0*s.* 10*d.*: William Smith 2387*l.* 14*s.* 6*d.*; and George Wagner 85*l.* 13*s.* 8*d.*; and he was executor of another joint creditor; who had proved 1308*l.* 18*s.*; and the prayer of the Peti-

tion was, that the dividend under the Commission may be ordered to be postponed, until after the Decree shall have been obtained in the cause.

The affidavits as to the solvency of the house at the death of Devaynes were contradictory; and it was insisted, that the accounts produced made no allowance for bad debts; particularly one from an insolvent house \*at Liverpool, to the amount [\* 517] of 120,000*l.*; which made the balance against them decisive.

Sir *Samuel Romilly* and Mr. *Cooke*, for the Petitioners, and Mr. *Bell*, for the Assignees, in support of the Petition.—This Petition rests upon the principle, under which a surety may call upon a creditor, having another fund, which the surety, paying the debt, cannot make available, to resort to that fund in the first instance. These petitioners, creditors of the four surviving partners, are entitled to relief of a similar nature, by an application of the surplus of the separate fund of the deceased partner to the joint debts; according to *Gray v. Chiswell* (1), and other cases; and, if upon the state of the accounts they were insolvent at Devaynes's death, his representatives cannot, as he, if living, could not, claim in competition with the creditors. It is clearly for the benefit of all the creditors that the joint creditors of the five should go in under the suit, instituted against Devaynes's estate; to that extent relieving the creditors of the four. Your Lordship will consider what is most for the advantage of the whole body of creditors; and, to obtain that, will postpone the dividend; disregarding the wish of any particular creditors to receive their dividend immediately.

Mr. *Martin*, Mr. *Leach*, and Mr. *Abercromby*, for the Executors and Widow of Devaynes; Mr. *Richards* and Mr. *Hart*, for the Son and residuary Legatee of Devaynes; also claiming as Creditors of the Bankrupts. Mr. *Wetherell*, for other Creditors.—

\* This is a new application; not upon the principle of [\* 518] making a just and equal distribution of the estate of the bankrupts among the different classes of creditors, according to their respective rights. Your Lordship, if you have authority, which is at least doubtful, will not suspend the dividend, when satisfied, that the delay must be of considerable duration: viz. until all the inquiries, that may be necessary for investigating the different claims, shall be completed; and the questions, arising upon them, decided. The object of this Petition is to relieve the creditors of the bankrupts by marshalling the assets of Devaynes: a purpose, which cannot be the subject of a Petition; but must be effected by a suit; in which the facts, being matters of account, may be clearly ascertained. Your Lordship will not upon the speculation suggested interfere with the right of creditors to their dividend under the Act of Parliament. The principle of the Bankrupt Law is, that securities and reversionary interests are to be sold, and the produce divided, without regard

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(1) *Ante*, vol. ix. 118.

to the disadvantage of an immediate sale, and the possible improvement from delay. This will be attempted upon every mortgage.

The Lord CHANCELLOR.—The real question upon this Petition is, whether at the instance of creditors of the four bankrupts, suggesting, that there are creditors of the four, who are also creditors of the five, I ought to stay the dividend; until payment shall have been recovered out of Devaynes's estate by those creditors, who are creditors upon both funds. That the creditors of the four have a clear interest to turn those creditors upon Devaynes's estate, is evident upon the circumstances: but whether they have the right, whether it is just that they should do so, is a very different consideration. The first question is, \* whether I have any right to stay the dividend: a point, upon which, as I have formerly intimated, my opinion is in some degree different from that of Lord Thurlow; who in the bankruptcy of Sir George Colebrooke expressed a very strong opinion, that no circumstance as to the impropriety of selling a West India estate ought to induce him to stay the sale, for the purpose of making a dividend, without the consent of all the creditors. I have intimated my opinion, that, if the dividends are not made at the very periods, prescribed by the Act of Parliament, it must of necessity be in the sound discretion of the Court to control the time; as it remains with the Court to direct, when the dividend shall be made; and it would be impossible for assignees to act in complicated cases, unless, exercising a sound discretion with reference to the period, when the assets are to be converted into money, they would be justified. A different rule would in many concerns impose upon them, as a duty, the necessity of ruining the property. My opinion therefore is, that I have a right to postpone the dividend; where I am satisfied, it is for the interest of all the creditors, claiming under the Commission, and just to all, whom the Order would affect.

The next consideration is, whether the creditors of the five have a separate demand against Devaynes's estate. Upon the authority referred to, and others, where parties think proper to enter into a joint, instead of a joint and several, contract, though I am surprised, that Courts of Equity have not left that to its fate, as a joint contract, they have, I admit, said, that there is a remedy against the assets of one deceased, if the survivors cannot pay. That must be however subject to many considerations: that may arise out of circumstances of subsequent dealing with the survivors; the effect of which may be, that the creditors have no remedy against the assets: but to \* oust their *prima facie* demand, it must be shown, that their subsequent dealings are of such a nature as to shift the equitable obligation to pay from the estate of the deceased partner.

Another question is, whether, if this was a Bill, filed by creditors of the four, they would have a right to insist upon the benefit, sought by this Petition. We have gone this length: if A. has a right to go upon two funds, and B. upon one, having both the same debtor, A.

shall take payment from that fund, to which he can resort exclusively ; that by those means of distribution both may be paid. That course takes place, where both are creditors of the same person ; and have demands against funds, the property of the same person. Here, it is true, there may be creditors, who have demands against the four, and others who have demands against the one : but it was never said, that, if I have a demand against A. and B., a creditor of B. shall compel me to go against A. ; without more ; as, if B. himself could insist, that A. ought to pay in the first instance ; as in the ordinary case of drawer and acceptor, or principal and surety ; to the intent, that all the obligations, arising out of these complicated relations, may be satisfied : but, if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A. ; if not founded on some equity, giving B. the right for his own sake to compel me to seek payment from A. If therefore I had before me a case, in which it was clear, that the creditors of the five could go against the estate of Devaynes and the four, yet, if it was not also clear, that the latter could have turned those creditors against the other fund, it does not advance the claim, that without such an arrangement they will get less. Unless they can establish, that it is just and equitable, that Devaynes's estate should pay in the first <sup>\*</sup>instance, they have no equity to compel a man to [<sup>\* 521</sup>] go against that estate, who has resort to both funds (1).

I do not know, that it would be even a useful arrangement ; as I can conceive a possible case ; that if the creditors of the five applied against the separate estate, the answer to that application might be, admitting his right, that he should first go in ; and prove against the estate of the four.

I admit the distinction, that Devaynes, being himself the debtor, could not claim in competition with the creditors (2) : but there might be a surplus ; and it appears to be perfectly competent, if not to the executors, to the creditors, to oppose this petition, that the dividend may be postponed, on the ground, that there will be an equitable application of Devaynes's estate to the satisfaction of some of these creditors in the course of which they are to proceed ; insisting on the extreme probability, that, instead of this right in the creditors of the four, the separate estate of Devaynes would, if the creditors of the five should go against it, have a demand against the estate of the four. That depends on the state of the accounts ; with reference to which it is impossible to conclude with certainty, that there is any such right ; and my opinion is, that the creditors of the four have no right whatsoever against the Will of the creditors of the five to turn them upon the estate of the fifth ; unless the four, if they were solvent, could turn those creditors, suing them, against the estate of the fifth. It is very doubtful, whether such a case exists ;

(1) See *ante*, *Dickenson v. Lockyer*, vol. iv. 36.

(2) *Ante*, *Ex parte Reeve*, vol. ix. 588 ; *Lodge & Fendall's Case*, stated 589 ; see *Ex parte Turner*, iii. 243, and the note.

and, unless it does exist, and there is a very strong probability of advantage, which is due in Equity to the creditors of the four, [\* 522] from \* postponing the dividend, though I have the power, I should not without a very clear case be disposed to exercise it.

*May 6th, 7th.* The Lord CHANCELLOR [ELDON].—With regard to the doubt, stated in the discussion of this Petition, whether I can order the dividend to be delayed, upon consideration my opinion remains ; that if the dividend is not made at the precise period, pointed out by the Act of Parliament, the Court of necessity has a discretion for the general benefit of the creditors, and as having the right to take order for the distribution of the property, to make such Order as to the time of making the dividend as shall appear to be for the general benefit of the creditors.

The object, for which I am pressed to postpone the dividend, is, that certain of the creditors, having a right to prove under the Commission of Bankruptcy, are also entitled in Equity, as having been joint creditors in Devaynes's life, to go in against his separate estate, subject to his separate debts ; and ought to be called upon to do so ; that, by the effect of their receiving payment from that estate, a larger dividend may be left, applicable to the creditors of the present firm. It was contended, that though at Law the debt survives, a demand may under circumstances be maintained in Equity against the assets ; and that it is so in many cases is established ; though doubted extremely by Lord Thurlow in *Hoare v. Contencin* (1). That is however an equitable right only ; to be met therefore by equitable circumstances ; and it does not follow in the distribution of such an estate as this, that, as some creditors may have that right in [\* 523] Equity, all the creditors of the five must have it. \*The answer may be, that, being equitable creditors, they have dealt so, that in equity they should not be so considered creditors upon that estate. In a Court of Equity therefore the case of every creditor, seeking resort against the assets, must be examined.

The petition however takes another ground ; proceeding upon the notion, that those, who are creditors of the four surviving partners, and never were creditors of the five, have a right to say to the latter, " You shall not interpose to take a dividend from the estate of the four, until for our benefit you have taken a part of the assets of the fifth." That is an equity, which the creditors of the four have not. I am extremely well satisfied, that a creditor, having a demand against one estate only of his debtor, may in Equity, proposing just terms, confine another creditor, having a demand against two estates of the same debtor, to make good his demand against that, upon which the former has no claim ; that he may go against the other : but the proposition is perfectly different, that creditors of the four partners, having no demand against the separate estate of Devaynes,

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(1) 1 Bro. C. C. 27 ; *Sumner v. Powell*, 2 Mer. 30.

shall compel the joint creditors of the five, being also legal joint creditors of the four, to go against the separate estate of Devaynes; whether it may be just, or not. The creditors of the four have no other right than the four themselves would have had; and the equity of the creditors in these cases is worked out through the equity, which the debtors themselves have. At the death of Devaynes, in 1809, laying out of consideration the debts of the partnership to the individual partners, my conclusion upon these accounts was, that the partnership was equal to the demands upon them; admitting, that, if the sums, standing to their credit, were due upon bad bills, and if the large debt at Liverpool was under similar circumstances, then certainly they were insolvent. \* Assuming the former [\* 524] fact, if the four had remained solvent, and made a demand against the separate estate of Devaynes, the answer might have been, that as to him the partnership was dissolved by his death: the account ought to be taken at that time; and the specific assets applied to the debts.

It is perfectly clear, that the operation, which is the object of this petition, would, if the creditors of the four partners have a right to demand it, produce a larger dividend than would otherwise be payable to them: but a previous consideration is, whether, if any creditor would not submit to this delay of the dividend, preferring a less dividend immediately, I have authority to postpone it. Commercial affairs, it is obvious, are become so complicated, that the directions of the Act of Parliament (1), fixing certain periods, at which the assignees are to make distribution, can in very few instances be adhered to; and then it must belong to the discretion of that authority, which has from the Legislature the order and disposition of the bankrupt's estate to direct the distribution at such time as will be most beneficial and for the general interest of the creditors. It is impossible to put this construction upon the Act; that it is imperative on the assignees, having neglected to make a distribution on the precise day, to make it as soon afterwards as possible; even if the effect should be the sacrifice of nine tenths of the interest of all the creditors. My opinion therefore is, that I have a discretion to arrange the time of making a dividend for the general benefit of the creditors: but it is proper to observe, that Lord Thurlow appears to have thought this discretion much more limited than it seems to me to be.

\* I must, however, when called on to delay the distribution, take care not to interpose that delay, unless satisfied, that those, who apply, have a right to call for it; and that finally it will be beneficial to them and the general creditors. That in this case depends upon the point, whether the creditors, who were not creditors of the partnership in Devaynes's life, which I take to be the case of all these Petitioners, have a right to insist, that those, who are also creditors of the four surviving partners, still have a de-

mand against the separate estate of the deceased partner; and therefore creditors, who never were creditors of the five, have upon principles of equity a right to call on the creditors of the five, to resort to the assets for the benefit of those, who never stood in that relation. The first consideration with reference to that is, whether the creditors of the five can resort to the separate estate of the deceased partner; and, without going through all the authorities, and repeating Lord Thurlow's doubt in *Hoare v. Contencis* (1), and my own surprise, that a Court of Equity should have interposed to enlarge the effect of a legal contract, the modern doctrine certainly is, that where a man has chosen to take the joint credit of several, though at law his security is wearing out, as each of his debtors dies, yet it is fit, that the creditor, whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a Court of Equity will under certain modifications constitute that demand.

It must still be recollect, that this is a demand in equity only: and to be enforced only upon equitable principles. It is therefore too much to hold, that, as this doctrine prevails here, that creditors of the four, who were also creditors of the five, may in [\* 526] certain \* circumstances go against the assets, therefore every man, who can show, that he was a creditor of the five, is still to be so considered; and that it is competent to every such individual to go in under a Decree for the separate creditors of Devaynes against his assets; as still retaining the right to resort to those assets. That right standing only upon equitable grounds, if the dealing of a creditor with the surviving partners has been such as to make it inequitable, that he should go against that fund, he would not upon general rules and principles be entitled to the benefit of that demand. I do not recollect an instance, that this right to go in upon the separate fund, not given by the legal contract, was extended beyond those, who were creditors of the whole firm.

Supposing, that all those creditors could go in, the next question is, whether the creditors of the four can compel them to go in. With regard to that, though much artificial doctrine has been introduced in this Court, yet creditors, as such, independent of the effect of any special contract, have no lien or charge upon the effects of their debtor; and in all these cases of distribution of joint effects it is by force of the equities of the partners among themselves that the creditors are paid; not by force of their own claim upon the assets; for they have none. The four surviving partners could only call upon the estate of Devaynes, after all the assets, belonging to the partnership, were applied to the satisfaction of the creditors at the time of the dissolution, produced by his death. The partners might then have said, if there was a deficiency of the assets to pay the creditors of the partnership, the partners must contribute to that deficiency in the proportions, in which they are respectively interested

in the partnership : supposing, for instance, the deficiency of 80,000*l.* and Devaynes's proportion 30,000*l.*, they might have called on his assets to \* contribute in that proportion ; they contributing in the proportion of 50,000*l.* : but they could not possibly call upon his assets to contribute in a greater proportion. If therefore the deficiency is larger, as it is represented in this case at 110,000*l.*, and they can call for more, it is not by their right : but, if the assets are liable at all, it must be by the will and pleasure of those creditors alone, whose demands are not satisfied.

Then, if the four surviving partners themselves could not call upon the assets for this deficiency of 110,000*l.* I cannot conceive, how their creditors can do so. The equity is clear upon the authorities, that, if two funds of the debtor are liable to one creditor, and only one fund to another, the former shall be thrown upon that fund, to which the other cannot resort ; in order that he may avail himself of his only security : where that can be done without injustice to the debtor or the creditor : but that principle has never been pressed to the effect of injustice to the common debtor : much less have persons, who are not common creditors of the same debtor, a right to compel the creditors of both funds to resort to the one : in order to leave a larger dividend for those, who can claim only against the other.

The conclusion is, that these creditors have no right to stay the dividend upon a ground, which may finally fail altogether ; and farther in many cases the representative may be entitled to say to a creditor, who chooses to make the demand, that justice requires the surviving partners to pay the debt : they are to be considered the principals : he is merely a surety ; and therefore a Court of Equity would not permit them to call upon him for payment ; except upon an equitable arrangement and modification ; requiring them to assign the dividend. The consequence is, that this Petition certainly cannot be complied with ; and for this reason ; that I do not think \* I could say upon a Bill, that these creditors [\* 528] have the equity, now represented (1).

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1. This case is likewise reported in 1 Rose, 71.  
2. That the court, sitting in bankruptcy, has a discretionary power of ordering the declaration of a dividend to be postponed, see, ante, note 2 to *Ex parte Goring*, 1 V. 168.

3. Where the original intention of the parties to a bond was, that the security, though it appears to have been executed as a joint bond only in point of form, should constitute a legal demand upon the estate of any of the obligors who may die before it is paid, as well as upon the survivors, there a court of equity, sitting in bankruptcy, if the estates of the surviving obligors are insolvent, will give a remedy against the estate of the deceased obligor : *Gray v. Chinwell*, 9 Ves. 125 ; *Vulliamy v. Noble*, 3 Meriv. 619 ; and see, ante, the note to *Thomas v. Frazer*, 3 V. 399, and note 3 to *Burn v. Burn*, 3 V. 573. The general mercantile law, indeed, holds every partnership contract to be several as well as joint ; and this, Sir Wm. Grant has intimated, may probably be the reason why courts of equity have

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(1) See the various questions upon the claims of the different classes of creditors determined in the case of *Devaynes v. Noble*, 1 Mer. 529 ; *Gough v. Davies*, 4 Pri. 200.

considered partnership contracts, which are joint in point of form, as standing upon a different footing from other joint contracts; *Sleech's case*, 1 Meriv. 564: and, moreover, where a debt has been incurred by a partnership, all the partners have had a benefit from the money advanced, or the credit given, and the obligation to pay exists, independently of any instrument by which the debt may have been secured: *Sumner v. Powell*, 2 Meriv. 37.

2. As general doctrine, when one party has a remedy against two funds, equity will take measures to prevent the exercise of this option from disappointing another just claimant, who has only one fund to which he can resort, see note 1 to *Al-drich v. Cooper*, 8 V. 382, with the farther references there given.

5. The rule laid down in the principal case, that no partner of a firm, against which a commission of bankruptcy has issued, can claim in competition with his own creditors, admits a necessary exception, when one partner has become a creditor of the rest of the firm, in respect of a fraudulent conversion of his separate estate to the use of the partnership (*Ex parte Sililoe*, 1 Glyn & Jameson, 382); or where, *vice versa*, the partnership funds have been secretly applied by one partner to his separate use: but, to raise this equity, the funds, in respect of which proof is tendered, must have been abstracted under circumstances from which the law implies fraud: see the note to the case *Ex parte the Assignees of Lodge and Fen-dall*, 1 V. 166. And, where some of the members of one joint firm have likewise been engaged in a distinct business, upon the failure of either establishment, and a commission of bankruptcy issued, proof may be admitted of any *bona fide* debt due from one firm to the other, in respect of goods furnished in the way of trade, though not in respect of advances of money from one set of partners to the rest: see note 6, 7, to *Curtis v. Perry*, 6 V. 739.

6. As to the general rule, regarding the application of joint and of separate property, to the discharge of joint or separate demands, see notes 3, 4, to *Hankey v. Garrett*, 1 V. 236.

7. The bankruptcy, under which the petition in the principal case was presented, gave rise to many very important questions, the proceedings, in respect of which are reported in 1 Meriv. 529-625, and 3 Meriv. 593-621, under the several titles of *Devaynes v. Noble and others*, and *Vulliamy v. Noble and others*.

### EARLE v. WILSON.

[ROLLS.—1811, MAY 20, 21.]

UNDER a bequest "to such child or children if more than one as A. may happen to be *encient* of by me," a natural child, of which she was then pregnant, cannot take; though a bequest to the natural child, of which a woman was *encient*, without reference to any person as the father, would probably be good; having no uncertainty.

Rule, that a bastard cannot take as the issue of a particular person, until it has acquired the reputation of being the child of that person; which cannot be before its birth (a), [p. 531.]

WILLIAM KEMPE by his Will, dated the 27th of October, 1794, after some specific bequests gave all the rest of his goods and chattels, live and dead stock, &c. and personal estate, to his executors, for the purposes after mentioned; and then devised all his real estates to trustees, their heirs and assigns; upon trust, to sell and dispose of the said personal and real estates, to pay his debts, legacies, and funeral expenses; and after payment thereof to invest the surplus in

(a) See, *ante*, note (a) *Cartwright v. Vaudry*, 5 V. 530.

Government Funds or land security to be divided equally between his sons Richard Russell Kempe and William Kempe, and his daughters Timothea and Wilhelmina Sophia Kempe, share and share alike, and to be paid them respectively at their ages of twenty-five years or day of marriage with consent of his said trustees, whichever of them should first happen; and if either of them his said sons and daughters should happen to die before his or her age of twenty-five years or day of marriage; as aforesaid, then the share of him or her so dying should go to and be divided equally between the survivors of them, if more than one, or the only survivor; and upon farther trust by and out of such moneys, or the interest, dividends, rents, &c. in the meantime to maintain and educate his said sons and daughters properly, and as they should judge fit; and to allow their \*aunt Mary Mackerel a competent yearly [\* 529] sum for her trouble in attending them.

The testator made the following codicil, dated the 10th of March, 1797:

"I moreover give to the said Mary Mackerel the annual sum of 50*l.* per annum to be paid half-yearly by equal portions so long as she superintends my children and afterwards during her life to be paid and commence the second quarter-day after my death. Item, as I had long resolved to marry her for the goodness she has shown my children, so it being doubtful whether I may recover of a wound which I received some time ago I give and bequeath to such child or children if more than one as she may happen to be *entitled* of by me the sum or sums if more than one by way of portion as my other children will be entitled to under my Will; and if he she or they being males die before twenty-five years of age such portion to go over to my executors for the purposes of the trusts of my Will; and such child or children if two be females the said portion or portions of such child or children dying before marriage shall go to my said executors for the trusts of my Will."

The testator died on the 7th of June following; leaving the Defendant William Kempe, his eldest son and heir-at-law, and by the custom, &c. the Plaintiffs Richard Russell Kempe, Timothea Kempe, and Wilhelmina Sophia Kempe, his only other legitimate children: but Mary Mackerel was shortly after his death delivered of a daughter, the Defendant Mary Ann Kempe; and Mary Mackerel died a few days after the birth of that child.

The Bill, filed by the legitimate children, and the husband of Timothea, prayed that the remaining trusts of \*the Will may be carried into execution: and that the residue of the [\* 530] testator's real and personal estates, and the rights and interests of the Plaintiffs, and all persons interested, may be ascertained.

The infant Defendant Mary Ann Kempe by her Answer claimed the same interest as the other children.

Mr. Richards, Sir Samuel Romilly, and Mr. Roupell, for the

Plaintiffs, referred to Co. Lit. (1) and *Metham v. The Duke of Devon* (2); establishing, that a bastard cannot take; until he has acquired a name by reputation.

Mr. Hart and Mr. Bell, for the Defendant Mary Ann Kempe.—The position of Lord Coke is not supported by the authority referred to. The case of *Blodwell v. Edwards* (3) was not decided; and the Judges differed upon it. It is not however to be disputed, and is admitted, that a natural child *en ventre* is capable of taking: a question, which until the decision of *Long v. Blackall* (4) was not settled as to a legitimate child. The alleged disability depends upon the added words "by me;" and the question is, whether that particular specification has the effect of vitiating a disposition, placed beyond dispute by the preceding words; or is to be rejected, as mere surplusage, under the circumstance of his apparent security, that the child, of which she was *encient*, the object of his bounty, was his own. The person intended is sufficiently pointed out; without adverting to \* those words, which are liable to objection; and the Court will not upon the case of *Metham v. The Duke of Devon* suppose him to contemplate any child she may be hereafter *encient* with by him. The Court does not suppose this bequest to operate as a continuance of the intercourse; or that it will continue; as the testator in that case contemplated all future illegitimate issue. These words are to be considered, not so much a part of the description, as a declaration of his reason for making a provision for this child.

Mr. Richards, in reply.—The question is, whether this is not much too loose a designation of the object: whether any one particular object, and period, is marked out. The construction must be any child, at any future time. The clear law is, that an illegitimate child cannot take, unless pointed out by clear description; even in the most favorable case: *Cartwright v. Vawdry* (5). Here is nothing to ascertain, that he meant the child, of which she was then *encient*.

1811. May 21st. The MASTER OF THE ROLLS [Sir WILLIAM GRANT].—Whether the case, referred to by Lord Coke, does, or does not, fully warrant the rule, laid down by him, yet his own great authority, and the adoption of it by Lord Macclesfield, are sufficient to induce me to adhere to it; without nicely examining the reasons,

upon which it stands. The rule is in substance, that a bastard cannot \*take as the issue of a particular person, until it has acquired the reputation of being the child of that person; which cannot be before its birth.

If the bequest had been to the natural child, of which a particular woman was *encient*, without reference to any person, as the father,

(1) Co. Lit. 3 b. See Mr. Hargrave's note, 14.

(2) 1 P. Will. 529.

(3) Cro. El. 509; Noy, 35; Moor, 430; 2 Rol. Ab. 43.

(4) Ante, vol. iii. 486; 7 Term Rep. 100.

(5) Ante, vol. v. 530; see the note, 534; *Godfrey v. Davis*, vi. 43.

there would be no uncertainty in that bequest; and probably it would be held good (1): but here there is no gift to the child, of which Mary Mackerel might be *entitled*, except as the child of the testator. It was not a matter of indifference to him, whether that child should have been begotten by him, or by another man: therefore I cannot do what is required; that is, reject the words "by me," as superfluous. Supposing the words, "as she may happen to be *entitled* of by me" could be taken to mean "as she is now *entitled* of by me," in which there is considerable difficulty, yet, if the rule of law does not acknowledge a natural child to have any father, before its birth, that mere change of phrase could not have the effect of making the bequest good. He means to give to an unborn bastard by a description, which the law says such person cannot answer; and, if you take away that part of the description, *non constat*, that the gift would ever have been made.

Therefore, without breaking in upon the rule, laid down by Lord Coke, and considered by Lord Macclesfield as established, I cannot hold, that there is sufficient certainty in the description of this legatee.

In *Evans v. Massey*, 8 Price, 34, Richards, C. B., said, he could not entirely accede to the principal case, as he did not understand the grounds upon which it proceeded; but Lord Eldon in *Gordon v. Gordon*, 1 Meriv. 153, desired that his Judgment in that case should not be considered as in any degree affecting the principle of the decision in *Earle v. Wilson*. His lordship anxiously repeated, that the decree he was then making should not be taken as governing either the question of what his decision would be if the words of bequest, by a testator to an illegitimate child, were "to my child," or if the bequest were to an illegitimate child, though such child were sufficiently pointed out as the child of a particular mother, but such child was (not only unborn, but) not in *esse*, *en ventre sa mere*. It seems, however, that a prospective bequest to an illegitimate child, with which a woman is supposed to be *entitled*, may be good, if the description of the object of bequest be so distinct as to leave no doubt as to the individual for whom the legacy is intended: *Evans v. Massey*, 8 Price, 34; *Gordon v. Gordon*, 1 Meriv. 153; though a contrary opinion appears to have been held formerly: see *Wilkinson v. Adam*, 1 Ves. & Bea. 468; and *Arnold v. Preston*, 18 Ves. 288. As to the general rule, that illegitimate children may take, as *personae designatae*, under a will which sufficiently points them out, see, *ante*, note 3 to *Standen v. Standen*, 2 V. 569; see, also, note 1 to *Godfrey v. Davis*, 6 V. 43.

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(1) 1 Ves. & Bea. 446, in *Wilkinson v. Adam*; and so decided *Gordon v. Gordon*, 1 Mer. 141.

**AGAR v. FAIRFAX.  
AGAR v. HOLDSWORTH.**

[ROLLS.—1808, Nov. 29, 30. UPON APPEAL. 1809, Nov. 13. 1810, MAY 20, 30; DEC. 11. 1811, MARCH 15.]

**DECREE** for partition among several joint proprietors; and no objection from a covenant not to inclose without general consent, rights of common, and the inequality and uncertainty of the shares in proportion to other estates.

The Decree directed a reference to the Master to inquire, whether the Plaintiff and Defendants, or any and which, are entitled; and in what shares, according to the respective values of the other estates; and then a Commission to divide accordingly; the costs of the partition to be borne by the parties in proportion to the value of their respective interests; and no previous or subsequent costs, by analogy to the Proceeding at Law (a).

Upon a Bill for Partition the interests and proportions to be ascertained by the Court, not the Commissioners, [p. 543.]

A Partition never affects third parties: rights of common for instance, [p. 544.] Commission to make partition, not under the authority of any Act of Parliament, but from the difficulty attending partition at law; where the Plaintiff must prove his title, as he declares; and also the titles of the Defendants; by analogy to the equitable jurisdiction in the case of Dower (b), [p. 552.]

THE Bill stated, that Lord Fairfax and other persons were in 1716 seised in fee of the manor of Bilbrough in the county of the city of York, and of the greatest part of the lands in the said manor, and also the whole of the piece of land in the said manor, called Bilbrough Moor, then uninclosed; and by indentures of bargain and sale and release, dated the 14th of July, 1716, Lord Fairfax, and the other persons, so seised, sold and conveyed all the said manor, lands, and Bilbrough Moor, and other estates in the county of the city of York, to the use of Robert Fairfax and John Hardwicke and their heirs.

By indentures of lease and release, dated the 7th and 8th of September, 1716, reciting, that part of the purchase-money, paid for the

(a) As to costs, see 2 Barbour, Ch. Pr. 313; *Phelps v. Green*, 3 Johns. Ch. 305. The parties whose taxed costs exceed their rateable proportions of the whole costs, are entitled to execution against those whose taxed bills are less. *Tibbits v. Tibbits*, 7 Paige, 204.

(b) As to the jurisdiction of Equity in cases of partition, see, *ante*, note (b) *Mundy v. Mundy*, 2 V. 122; 2 Barbour, Ch. Pr. 284, 285; Graham, on Jurisdiction, (ed. 1839,) 564-568; *Matthews v. Matthews*, 1 Edw. Ch. 568; *Cheeseman v. Thorne*, 1 Edw. Ch. 629; 1 Story, Eq. Jur. ch. 14, § 646, *et seq.*; 4 Kent, (5th ed.) 364, 365, and notes; *Coleman v. Hutchinson*, 3 Bibb, 209.

Where the title is denied, on suspicion, Courts of Equity will not interfere until the party seeking a partition has had an opportunity to try his title at law. See 4 Kent, 364, 365; *Manners v. Manners*, 1 Green, Ch. 384; *Straughan v. Wright*, 4 Rand. 493; *Stuart v. Coalter*, 4 Rand. 74; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; *Core v. Smith*, 4 Johns. Ch. 271; *Phelps v. Green*, 3 Johns. Ch. 302; *Martin v. Smith*, State Eq. Rep.; S. C. 106.

In Massachusetts, Maine, New Hampshire, Ohio, Illinois, and Georgia, and probably in most of the other States, partition may be obtained by petition to the Courts of law without writ. 4 Kent, Com. 364, and notes.

As to partition of mill-privileges, and the difficulties in such a case, see, *ante*, note (a) *Turner v. Morgan*, 8 V. 145; *Miller v. Müller*, 13 Pick. 237; *Morrill v. Morrill*, 5 N. H. 134.

premises, conveyed by the former deeds, was advanced to Robert Fairfax by Thomas March, under an agreement, whereby he was to become the sole purchaser of the lands and hereditaments, therein mentioned, Fairfax and Hardwicke conveyed to Thomas March and Arthur March the several lands, particularly described, situate in Bilbrough, and also all the said Thomas March's part and share of and in the moor or common, called Bilbrough Moor, and of and in the \* soil, freehold, and inheritance, of the same ; [\* 534] which part or share, it was thereby declared, Thomas March had purchased of Robert Fairfax, together with the farms and lands, thereby granted and released : and that the said moor was to be estimated and allotted between the said Robert Fairfax and the said Thomas March, and the other purchasers under Robert Fairfax and John Hardwicke ; viz. Charles Redman, Bernard Banks, Matthew Smith, and Nathaniel Hird, in proportion to the several farms and lands in Bilbrough aforesaid, by them respectively purchased, and the valuations of the same, whenever the said moor or common, called Bilbrough Moor, should happen to be inclosed in time to come ; but reserving to Fairfax and Hardwicke, their heirs and assigns, all the back lanes and the high street, and a small waste thereupon in Bilbrough aforesaid ; with liberty to them to inclose the same ; subject nevertheless (both before and after such inclosure) to such ways, &c. in and through the same, to be made by the said Thomas March, his heirs and assigns, as had been anciently and customarily used and enjoyed by the tenants, owners or occupiers, of the farms, lands, and premises, thereby released to March and his heirs : to hold to Thomas and Arthur March, their heirs and assigns for ever.

The Bill farther stated, that Redman, Banks, Smith, and Hird, respectively purchased under Fairfax and Hardwicke divers farms and lands in Bilbrough, and also several parts or shares of Bilbrough Moor, and of and in the soil, freehold, and inheritance thereof, in proportion to the several farms and lands in Bilbrough aforesaid, by them respectively purchased, and what should be the value thereof respectively, when said piece of land, called Bilbrough Moor, should be divided or inclosed, in the same manner as the share of Thomas March in the said moor was to be estimated and allotted ; and the said \* messuages, farms, lands, and premises, and [\* 535] the said parts or shares of Bilbrough Moor, were conveyed to Redman, Banks, Smith, and Hird, and their respective heirs and assigns in fee-simple ; and Fairfax and Hardwicke retaining the remaining part of the said lands in Bilbrough, and a part or share of Bilbrough Moor, and of and in the freehold and inheritance thereof, in proportion to the farms and lands in Bilbrough aforesaid, retained by them, and what should be the value thereof at the time, when the said piece of land, called Bilbrough Moor, should be divided or inclosed in the same manner as the share of the said Thomas March in Bilbrough Moor was to be estimated and allotted.

Arthur March, who was a trustee for Thomas March, died in his life-time : and Robert Fairfax died in the life-time of Hardwicke

and by divers mesne conveyances, &c. the whole of the said premises, conveyed to Fairfax and Hardwicke, and Bilbrough Moor became vested in the Plaintiff and such of the Defendants to the original Bill, as therein named, in the manner, shares, and proportions, therein stated: and they, and no other person, was seised in fee of the whole of Bilbrough Moor, and the freehold and inheritance thereof, as tenants in common; which had been used and enjoyed by them, and those, under whom they derived title, as common of pasture for horses, &c.

The Bill prayed an account of the lands in Bilbrough, conveyed to Thomas and Arthur March, and those purchased by Redman and the other persons from Fairfax and Hardwicke, and of the lands retained by them; that the value of the said lands may be ascertained; and that a Commission may be directed to issue; to ascertain the value of the said several lands, and the parts or shares of the Plaintiff and the other persons, named in Bilbrough  
[\* 536] Moor; \* and also to allot in severalty, make partition of, and divide, Bilbrough Moor into six several parts or shares, in proportion to the amount of the true and just value of the several farms and lands in Bilbrough, so conveyed and purchased, or retained; and that all the said shares of Bilbrough Moor, when so allotted, may be inclosed, and held in severalty, by the Plaintiff, and the other persons entitled, &c.

The answers stated, that in each of the derivate conveyances to the joint or sub-purchasers under Fairfax are contained covenants against inclosures of the moor without consent: viz. covenants by Robert Fairfax and John Hardwicke respectively, with each of the sub-purchasers, that neither he nor his heirs and assigns should or would inclose, or cause to be inclosed, any part of the said moor, other than the back lanes, and small waste, as therein mentioned, without the consent of the said Thomas March, &c. his heirs or assigns; and Thomas March and the other sub-purchasers entered into similar covenants with Fairfax and Hardwicke not to inclose without the consent of them and their heirs. The answers also stated the persons, in whom the estates so conveyed to Fairfax and Hardwicke, were vested; and that those persons, and their tenants, not exclusively, but together with others, had enjoyed and exercised the herbage and other rights and privileges in and upon Bilbrough Moor; and that the several rights, shares, and interests, of the persons entitled were uncertain, and in no wise ascertained; and the Defendants submitted, that such partition as was sought by the Bill, ought not now to take place; particularly as such rights and interests and the other rights and interests in and to the said moor were uncertain and indeterminate; and the parties concerned were not agreed, and had not consented to having an inclosure  
[\* 537] or partition thereof; and submitted, \* that the case now before the Court was not proper for a partition and inclosure by a Court of Equity, but by Act of Parliament only; where facilities and benefits might be secured; and objections and incon-

veniences obviated; the former of which could not be extended, and the latter removed, if the present attempt to obtain a partition and inclosure in this Court should succeed.

Mr. Richards and Mr. Bell, for the Plaintiff.

Sir Samuel Romilly and Mr. Hall, for the Defendants.—A Bill for a partition under these circumstances is without precedent. Partition is of common right between parcelers, joint tenants and tenants in common: but it could not be compelled either at Law or in Equity, except among parcelers, before the Statute of Henry VIII. (1), which gave it to joint tenants and tenants in common of estates of inheritance; and in the following year it was extended to particular estates. It cannot be applied to interests of any description, beyond those defined limits; comprising persons with characters ascertained, and rights perfectly clear. These persons are represented as *quasi* tenants in common. A tenancy in common may be of unequal, but not of unascertained, shares. In the declaration, between parcelers, or joint tenants, the demandant must state the title; and the distinct shares must appear: between tenants in common the declaration must state the title and share of the Plaintiff; and the shares, though not the distinct titles, of the Defendants. The Statute of William III. (2), for advancing this remedy, adding particular ceremonies, declares, that in default of appearance the Court may proceed to examine the demandant's title and the quantity of his purpart; and shall for so much give judgment by default: and award a writ to make partition; whereby such purpart may be set out in severalty. The partition can only proceed upon the title, so ascertained on the face of the instrument, not by inquiries.

It cannot be maintained, that common-rights form no objection. The Lord could not except under the Statute of Merton (3) have inclosed, or taken any part of the waste; and that Statute gives the right of approving with the qualification, that it shall not be to the prejudice of the commoners; for whom it requires sufficient to be left. Even for the purpose of inclosure partition cannot be made in prejudice of that right; and much less for any other purpose. The Statute of Edward VI. (4) accordingly declares the right of the commoner to pull down an inclosure by the Lord, infringing that right; and gives the remedy by assize, with treble damages. Formerly a greater degree of strictness prevailed upon partition here than in Courts of Law; and that appears to be Lord Hardwicke's opinion in *Cartwright v. Pultney* (5). In Lancashire there are many instances of rights, enjoyed by several persons; capable of being ascertained; but still uncertain: of which therefore they cannot be considered tenants in common; and, if ascertained, they could

(1) Stat. 31 Hen. VIII. c. 1, s. 2; Stat. 32 Hen. VIII. c. 32, s. 1.

(2) C. 31.

(3) Stat. 20 Hen. III.

(4) 4 and 5 Edw. VI.

(5) 2 Atk. 380.

not remain two days without variation; fluctuating continually according to the management, husbandry, and cultivation, of the different proprietors.

This property therefore, enjoyed in common, but by unascertained, indefinite, shares, is incapable of partition. It is impossible to frame a declaration; as the ascertained part cannot be proved; and

[\* 539] no inquiry can be directed for that purpose. Farther difficulties arise from the nature of the \* property, with reference to rights, long exercised and enjoyed upon it, independent of the title of these proprietors; being stocked, the herbage taken, &c. as it is said, by persons, having no right: but it might be common appendant, or because of vicinage; or common appurtenant, or in gross; by grant or prescription. A very formidable impediment is the covenant against inclosing without mutual consent; which can be the only object of partition.

The form of the Decree in these cases is not general. In *Curzon v. Lyster* (1), which was much considered, the direction was, that the persons named, any three, or two, of them, should go to, enter upon, walk over, and survey, the land; and make a fair partition, division, and allotment, thereof in moieties: one to the Plaintiff; the other to the Defendant; and the parts so allotted to divide by metes and bounds; and to examine witnesses upon such interrogatories as they shall see occasion; &c. In some instances close Commissions were granted: the Commissioners administering an oath of secrecy to the several person before them; the Commission in *Curzon v. Lyster* originally was so: but according to Lord Redesdale's clear opinion that is erroneous: the Commission is in all respects analogous to the writ of partition: the Commissioners are to do what the Sheriff and Jury would have done; and have no power to make any inquiry except as to the very lands to be divided. The Commission being in particular, ascertained, forms, a new one cannot be directed; and certainly not such as is now required; with power to compel a production of title deeds: to examine witnesses, and then to go upon each separate estate; ascertain the value; and divide accordingly; asking, in the alternative, either a Commission, [\* 540] or a reference to the Master for the purpose of all these inquiries. The result will be several distinct cases; producing all the inconvenience, which the covenant against inclosure without mutual consent was intended to prevent.

Mr. Richards in reply.—All persons, supposed to have rights of common, were made Defendants; and all disclaimed; except two; who are parties; claiming right of common without stint, annexed to houses; directly contrary to Law. If there are any common rights subsisting, they cannot be affected by partition. Admitting, that the shares are not ascertained, that may, and will, be done by the Commissioners; who will ascertain the shares, in which all these joint proprietors of the land are interested; and for that purpose

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(1) Cited from a ms. note.

some previous inquiry may be necessary. In *Calmady v. Calmady* (1) much previous investigation was required; to ascertain the shares; and to make the proper distinction as to the costs. That course must be taken in every case, where the parties differ as to their respective interests; either by an inquiry before the Master, or some other means; as in the case of dower; which is as much a right at Law as partition; and depends in this Court on much the same principle. The Court will find its way to the ultimate purpose: in the one case the widow's right of dower: in the other a partition among persons, having an undivided interest, either as joint tenants, co-parceners, or tenants in common.

This is clearly a tenancy in common: the trustees of Lord Fairfax, seized in fee of the whole, conveying distinct farms, and shares of this moor, to the several \* persons, from [\* 541] whom these parties claim. Under these circumstances a partition is matter of right: *Parker v. Gerard* (2). The shares are in contemplation of law ascertained; if they are capable of being ascertained; as they are by reference to the prices, paid by the several parties. In *Leigh v. Leigh* a manor, an entire thing, was the subject of partition; and it was impossible to know the value of a moiety of a sixth part without knowing the value of the whole. The only parties to the cause were those, who were entitled to a moiety of a sixth; the Commissioners must therefore have taken into consideration a subject of property, in the hands of persons, not parties; and the duty of the Commissioners was not less difficult than what is required by this Bill; a valuation, having regard to the lands possessed by parties in the cause: in that case a valuation with reference to shares of a manor, not belonging to any party in the cause. This Plaintiff prays the Court to declare the rights according to this deed; and that the Commissioners shall divide according to the rights, so declared. That object must be obtained, if not through Commissioners, by a reference to the Master, under all the circumstances; these parties being clearly tenants in common, entitled in shares, to be ascertained by comparison of the different farms and respective interests in the moor. The Commissioners are to exercise their judgment according to the original price, or rather the present value; which is the true construction; and for ewlty of partition they may in their discretion give more to one than another.

The covenant not to inclose is merely a private engagement; and cannot be considered as binding the parties not to apply to the law of the country; as a \* covenant to refer to arbitration [\* 542] will not prevent the party's assertion of his right in a Court of Justice. This is a covenant, inconsistent with the estate; applicable only to certain cases; and cannot prevent partition for ever. Partition is not within the terms of a covenant not to in-

(1) *Ante*, vol. ii. 568; Reg. Book, 1794, A. fo. 460.

(2) Amb. 236. See *Warner v. Baynes*, Amb. 589; *Turner v. Morgan*, *ante*, vol. viii. 143.

close : and there may be great advantage from partition without inclosure. The Commission in *Curzon v. Lyster* was settled by the Master : the forms being very different.

**THE MASTER OF THE ROLLS.**—I shall take a little time to consider, what will be the proper Decree in this case. At present I am strongly inclined not to decree an immediate partition, upon the grounds, that have been stated : but I wish to consider, whether, as incidental to the demand of partition, the Court would not put into a train of inquiry, what are the proportions, in which they are interested in these lands ; in order to lay a foundation for partition afterwards ; that previous inquiry to be before the Master ; whether the Commission ought not, as the writ always does, to state the proportions, in which the partition is to be made.

1808, Dec. 18th. **THE MASTER OF THE ROLLS** [Sir WILLIAM GRANT].—There are two cases, in which the Court referred it to the Master to ascertain the interests of the parties ; and afterwards directed a Commission to issue : *Calmady v. Calmady* (1) and *Duncan v. Howell*. The uncertainty of the shares is not a ground for definitively refusing a partition : it is for refusing it at present. It cannot be referred to the Commissioners to ascertain the interests. That must be done, as in those cases, by the Court, through the medium of the Master. In one of the cases the form of [\* 543] \* the inquiry was, what undivided shares the several parties were entitled to, and for what estates and interests therein respectively.

The way, in which it strikes me, is this. The parties have among them the whole interest in the soil and freehold, which they possess in common. Some of them seek a partition. It is said, there cannot be a partition on account of the uncertainty of their interests : the proportion, to which each is entitled, not being ascertained : that depending upon the quantity of interest each has in the estate of another, and the value of that estate ; with reference to which value the allotments of this moor are to be made among the parties, the owners of that estate, and of this moor also. That is no objection, as they are not the less tenants in common ; though an operation must be performed, before it can be ascertained, to what undivided shares they were entitled as tenants in common. It must be seen, what is the value of their shares in the other estate ; by reference to which this allotment is to be made ; and then they will be in the situation of parties, having ascertained interests in this moor ; but still they are tenants in common ; and therefore have a right to a partition.

It seems to me to have been soundly objected, that it is impossible in the present situation to issue a Commission ; as then it must be referred to the Commissioners, first, to ascertain their interests, and the proportions, in which they are entitled, and then to make the allotment. The former was never done by Commissioners.

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(1) *Ante*, vol. ii. 568.

The Court is to ascertain the proportions and rights of the parties; and when that is done, then the duty of the Commissioners begins; to make the division in those ascertained proportions.

\* An objection was then taken to the rights of common [\* 544] over this moor. The rights of common are no objection to the Commission; as that right will not be in the least affected by the partition; which regards only the freehold and inheritance of the soil. A partition never affects the interest of third parties. It is immaterial, whether others have a right over that soil and freehold, which they have in common among them. Those rights will equally remain.

It is then said, there is a covenant not to inclose except by consent of all the parties. I do not exactly understand, what is the meaning of that covenant. If it is only, as it is expressed to be, against inclosure, what has that to do with partition? Partition does not require inclosure, but only that an allotment shall be made by metes and bounds. Whether they may have a right to inclose afterwards may depend upon other circumstances. It may depend upon the rights of third persons over this land, and upon the agreement of the parties themselves. The covenant against inclosure may have its effect; and I am not now called upon to say, whether it shall, or not.

It is then said, the rule, by which the allotment is to be made, may be very unequal. It may be so: but it is a rule that they have laid down for themselves. The inconvenience is of their own making by the terms of their own agreement. If they were all agreed now, that there should be a partition, or that there should be an inclosure, this inconvenience as to the mode of making the valuation would still present itself.

There does not appear to me therefore in this case any thing to prevent a partition, after it shall have been ascertained,  
\* what are the proportions, in which the land is to be divided [\* 445] ed among the parties.

The Decree declared, that the piece of land called Bilbrough Moor, is to be allotted according to the present value of the several farms and lands in Bilbrough, purchased by Thomas March, &c. and conveyed to them by the several indentures of the 7th and 8th and 12th and 13th of September, 1716: and of the farms &c. retained by Fairfax and Hardwicke; and directed a reference to the Master, to inquire and state to the Court, what undivided shares the Plaintiff, and such of the Defendants as had any estate of freehold or inheritance in the said moor under the deeds of 1716, were entitled to or interested in the said moor; and for what estates and interests therein respectively, &c.; and it was ordered, that a partition should be made of Bilbrough Moor among the Plaintiff and the said Defendants, who by the Report should appear to be entitled to any shares of freehold and inheritance of Bilbrough Moor under the said deeds of 1716, according to such undivided shares thereof; and

it was ordered, that a Commission should issue for that purpose: all deeds in the power of the parties to be produced before the Commissioners, with liberty to examine witnesses, &c.; and it was ordered, that what should be allotted to the several parties should be held and enjoyed by them in severalty; and, if any of the parties were under any disability, they, when capable, and all other proper parties, should join in executing proper conveyances, &c. for conveying and vesting the several shares in and to the said parties respectively according to their several rights and interests of, in, and to, their several undivided parts and shares of and in the said moor,

the costs of the Commission and inquiry, and of the Defendant [\* 546] \* Parkin (the heir of Hardwicke), whose costs were ordered to be paid by the Plaintiff in the first instance, to be borne by the parties, interested in the moor, in proportion to what should be their respective shares and interests in it; with liberty to apply.

From this Decree a Petition of Appeal was presented; submitting, that, having regard to the nature and uncertainty of the rights of the parties, as well as of the value, and the particular circumstances of this case, it is not a case for partition, inclosure, or any relief, to be administered in a Court of Equity.

Mr. Richards and Mr. Bell, for the Plaintiff.—Since the case of *Warner v. Baynes* (1) the difficulty of making partition has formed no objection in this Court. This case presents no farther difficulty than that this property is to be divided, not in any certain specific proportions, thirds, fourths, &c. but according to the value of certain other estates. There may be some difficulty as to the proportions, until the valuation of those estates shall be made: but from that moment the proportions are accurately defined: and [\* 547] on that \*ground there is no more objection than to a devise of the residue of real estate among children, to make their fortunes equal, by reference to advances formerly made to them. This Court would proceed in many cases of complicated circumstances, from the intricacy of the title, and the nature of the shares; though a Court of Law could not. Tenants in common having a right to partition at law, there must be some mode of having a calculation, if necessary, before their precise rights, as tenants in common, can be ascertained. Whatever is capable of division may be the subject of partition: manors, for instance; with every right of the lord; and even the waste grounds are divided; *Sparrow v. Friend*:

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(1) Amb. 569. See *Turner v. Morgan*, ante, vol. viii. 143. In that case, the Commission having been executed, an Exception was taken by the Defendant; on the ground, that the Commissioners allotted to the Plaintiff the whole stack of chimneys, all the fire-places, the only stair-case, and all the conveniences in the yard.

1804, Aug. 1st. The Lord CHANCELLOR over-ruled the Exception; saying, he did not know how to make a better partition for them; that he granted the Commission with great reluctance; but was bound by authority; and it must be a strong case to induce the Court to interpose; as the parties ought to agree to buy and sell.

the Case of the Manor of Brighton (1); *Lane v. Cox*: the Manor of Rolleston in the County of Derby. In *Parker v. Gerard* it was resisted: the property, situated in the north of England, consisted of cattle-gates; and of certain other rights, of a very peculiar nature; and partition was decreed in very minute fractions according to the rights in the cattle-gates.

If there were other rights, existing over this moor, that would not be an obstacle to partition among these persons, having by conveyance from the trustees, rights in the soil or freehold. It is not however made out, and cannot be presumed that there are rights of common. As stated by the bill, they cannot be supported at Law. There is no proof, as suggested, that they were in the habit of taking greensward, or sods, earth and soil, from the waste of the manor; and no such right of common exists at law. As to furze and whins, &c. none of these are stated as rights of common: they merely say, they have been in the habit of taking them. A covenant \*not to divide is not legal. There is no defect of parties; [\* 548] and the decree is right in form; following the precedent of *Duncan v. Howell*; referring it to the Master to inquire, what undivided shares the several parties were entitled to in the estate in question; and of what estates; and directing partition to be made among the parties, who by the Report shall appear entitled to any share of the estate, according to the shares; and that a Commission should issue for that purpose; with the usual directions.

Sir *Samuel Romilly* and Mr. *Hall*, for the Defendants.—There is no instance of such a Bill as this; and the consequences it will lead to must be very important. The cases, referred to in the Register's Book, have no application. They are cases of complicated interests; in which it was very difficult to ascertain, in what proportions the parties were interested. There is no authority for the general principle, upon which it is attempted to maintain the Bill. This is the case, not of all the owners, except one, agreeing, but of one against the consent of all the rest claiming a partition and conveyance, contrary to the express covenant, entered into on account of the difficulty, that there should be no partition, unless they should all agree. If such a Bill can be maintained upon cattle-gates and common rights, why is application made to the Legislature to divide common rights? The difficulty from the number of parties may be overcome by the expedient of making some represent the rest; where it would be inconvenient to bring all before the Court.

All the authorities state, that a Bill for partition is exactly the same as the writ at Common Law; with this single distinction; that under the writ those only are bound, who \*are entitled to a subsisting estate of freehold; not [\* 549] those entitled in remainder; whom a Court of Equity will bind, as well as those, who have particular estates. On that ground Sir Thomas Clarke in the case of *Parker v. Gerard* (2)

(1) Cited from the Decree.  
(2) Amb. 236.

held, that this Bill is matter of right; and therefore no costs shall be given, as there are none upon the writ. Upon those principles the Court has granted partition, where it must be ruinous to all the parties; as in the case of the house, *Turner v. Morgan* (1). Upon the same principle in *Parker v. Gerard*, the interest of one party being so inconsiderable that he would have preferred giving it up, he was compelled to make partition; and to pay an equal share of the expense. A stronger instance cannot be produced, that the Court in these cases acts ministerially, rather than judicially. In many instances, where from the complication of the interests, the writ would not lie, this Court would decree partition; which will not be prevented by the difficulty of the division; nor, if it is to be in very small fractions, where they are clearly tenants in common of ascertained shares, can it depend on the amount of interest. In *Parker v. Gerard* the Master of the Rolls states the injustice, which the Court is frequently compelled to do; having no discretion upon the subject. The objection of difficulty is very strong in the case of an advowson.

How can such a Decree be executed? A considerable time may elapse between the Report and the partition: and the value at the latter period, upon which the shares must depend, may be materially varied. The consequences of this jurisdiction may be easily imagined. Some of these estates, having fallen to *femes covert*, infants, or persons in remote situations, may have been suffered to deteriorate; and that moment would be seized, by a person, [\*550] \* who had improved his; taking advantage of the consequence of superior wealth, or the neglect of the others, to claim partition. For the very purpose of guarding against that, from a foresight of the difficulty, confusion and injustice, to which it would lead, was this covenant against inclosure, except by general consent, introduced. It is said, the covenant is void; as inconsistent with the nature of the estate; and it would be so: but this is the case, not of tenants in common, standing upon the common law-right: but of persons, agreeing to hold, and looking to partition, in a mode, not according to the Law; protecting themselves against the improvidence of such an agreement in an unlimited way; and one of the parties to that special contract desires now to have a part-performance; striking out that express provision for the consent of all. A Court of Equity does not administer that peculiar and extraordinary relief, a specific performance of a contract, where the effect will be injustice; but leaves the parties to the Law; and this is a case most proper for the exercise of that discretion. Another difficulty arises from the rights of common of estovers and turbary: the Bill stating the manner, in which those rights have been always enjoyed.

The constant course of these Decrees is first to ascertain the shares; and then to come for a partition; and it may be doubted, whether one

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(1) *Ante*, vol. viii. 143.

of the cases, referred to from the Register's Book, in which that course appears not to have been followed, was an adverse Decree. The reference therefore in the first instance ought to be to ascertain, not the interests, but the value; computing the outgoings; &c.: so as to ascertain the value at the time of division: but, if the course is not to come to the Court again, the Commissioners must both ascertain the value, and make the division, in the first instance; \* which would be very inconvenient; and there is no instance of such a discretion in commissioners: the Court only giving them the rule.

This has not the character of a tenancy in common, in certain shares and proportions; and, besides uncertainty, another objection is, that nothing passed immediately by this deed. The objection of uncertainty here is much stronger than in the case, put by Walmesley in *Corbett's Case* (1); where the whole estate went to each on different days: but this consists of a great number of minute shares, constantly varying. They may have unequal shares; as Lord Hardwicke observes (2): but they cannot be uncertain. The Statute of Henry VIII. (3), gives partition between joint-tenants and tenants in common in the same manner as it previously could have been had between parceners. It was necessary therefore to obtain judgment in the same way upon the title in joint-tenancy; and, as tenant in common, the Demandant was obliged to state his title, and share; and the shares of the others; though he could not know their titles; and a mistake in stating the shares was fatal. Upon what ascertained share could any of these proprietors have declared? They calculate upon the value; which cannot remain the same for two days: and that objection of uncertainty applies equally to the whole and all the component parts: the number of shares always varying; and consequently the amount of each share. No instance can be produced of partition under this difficulty, arising from the number of shares, constantly varying; and an express provision, that they shall remain unascertained and indefinite.

*May 18th, 1810.* \*The Lord CHANCELLOR [ELDON].— [\* 552] The Plaintiff in this cause is entitled to a partition; but the Decree, though in terms as near as possible to the case of *Duncum v. Howell*, I think, is not in form the exact Decree authorized under the circumstances of this case by that precedent. The variation however will be in form merely; not in substance. The ground, upon which the case of *Calmady v. Calmady* (4) proceeded, was, that the Plaintiff, showing title to a part of the estate, was entitled to have a partition; and though the titles of the Defendants were not proved, a reference to the Master was directed for the purpose of ascertaining them; and the Report finding, that the Plaintiff and

(1) 1 Co. 76; see 87, a.

(2) 2 Ves. 81.

(3) Stat. 31 Hen. VIII. c. 1.

(4) *Ante*, vol. ii. 568.

the Defendants were entitled to the whole subject, upon farther directions the Decree was made for a partition according to the shares, so ascertained. I cannot find any other instance of such directions given as to the costs. How can I make infants pay costs?

This Court issues the Commission, not under the authority of any Act of Parliament; but on account of the extreme difficulty, attending the process of partition at Law (1); where the Plaintiff must prove his title, as he declares; and also the titles of the Defendants; and judgment is given for partition according to the respective titles, so proved. That is attended with so much difficulty, that by analogy to the jurisdiction of a Court of Equity in the case of Dower, a partition may be obtained by bill. The Plaintiff must however state upon the record his own title and the titles of the Defendants; and, with the view to enable the Plaintiff to obtain a judgment for

partition, the Court will direct inquiries; to ascertain, who [\* 553] are, \* together with him, entitled to the whole subject (2).

If therefore the state of the record, as originally framed, is not such as to authorize the Court to say, that the Plaintiff and the Defendants are respectively entitled in distinct shares, comprehending the whole subject, the proper course is to direct a reference to the Master; to ascertain, what are the estates and interests of the Plaintiff and the Defendants, respectively; and if it appears, that they, or some of them, are entitled to the whole, then to order a partition, according to the rights of all, or such of them as appear entitled; dismissing the Bill, as against those, who do not appear to have any right.

The Decree in *Calmady v. Calmady* is perfectly regular; directing the inquiry; and afterwards a Commission to issue; to divide the estate among the several parties, who appear upon the Master's Report entitled to it. The omission in this Decree to reserve farther directions is a mere informality, in not reserving a mode of dismissing from the record those, who may have no title. Considerable difficulty arises in this case from the covenant not to inclose.

The Order afterwards pronounced by the Lord Chancellor, directed the Decree to be affirmed with the alteration, after mentioned: viz. instead of the words, after the direction for the partition to be allotted "according to the present value of the several farms and lands in Bilbrough, purchased," &c.; inserting the following words: "in shares according to the present respective values of the several farms and lands in Bilbrough respectively purchased;" and adding a declaration, that the Plaintiff being entitled to an undivided part of the said piece of land, called Bilbrough Moor, has a [\* 554] \* right to call for a partition of the said piece of land, as between him and the several persons, entitled to the rest of the said piece of land: such partition to be made according

(1) See this subject considered by Mr. Fonblanque, 1 Treat. Eq. 18.

(2) See *Whaley v. Dawson*, 2 Sch. & Lef. 367.

to the declaration before mentioned; and directing a reference to the Master; to inquire and state whether the Plaintiff and the Defendants respectively, or any, and which of them, are entitled to the freehold and inheritance of Bilbrough Moor; and how; and if it shall appear, that all, or any of them, are so entitled to the said moor, then to ascertain the respective values of the farms and lands, respectively purchased, as aforesaid; and, having so ascertained the respective values of the said farms and lands, the Master is to ascertain as among the Plaintiff and Defendants, whom he shall find to be entitled to Bilbrough Moor, in what undivided shares they are respectively entitled, according to the declaration before mentioned; and in that case a Commission to issue to divide the said moor among the Plaintiff and Defendants, who by the Report shall appear entitled to any shares of the freehold and inheritance of Bilbrough Moor under the deed of 1716, according to such undivided shares thereof; with the usual directions for the production of deeds, &c. and liberty to examine witnesses: the shares, allotted to the several parties, to be held and enjoyed by them in severalty; and, if any parties, appearing entitled to shares in Bilbrough Moor, are under any disability, and not capable of making the conveyance; they, when capable, and all other proper parties, to join in all proper conveyances, &c. respectively, according to their several rights and interests of and in the several undivided shares of the said moor; and, if the Master shall not find the Plaintiff and Defendants, or any of them, entitled to the freehold and inheritance of the said moor, to state that to the Court before any farther proceedings; and the consideration \*of costs and farther directions was reserv- [<sup>\*</sup> 555] ed; with liberty to apply.

1810, Dec. 11th. The cause was heard for farther directions, and upon the costs.

Mr. Richards and Mr. Bell, for the Plaintiff.—The rule, laid down in the case of *Calmady v. Calmady* (1), is, that in these cases the costs are given in proportion to the interests of the parties. The Decree, distinctly directing the costs of the Plaintiff to be raised out of the estate, certainly has no such direction as to the

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(1) The Decree in that Cause declared, that, the Cause coming on for farther directions, the Report of the Commissioners was confirmed; and it was ordered, that, when the Defendant Hamlyn, an infant, shall attain the age of twenty-one, the Plaintiffs and the said Defendant shall execute mutual conveyances to each other of the several parts of the estate, allotted to them; and in the mean time the Plaintiffs and the Defendant to hold and enjoy the several parts of the estate, so allotted, &c.; and that the Costs of issuing and executing the said Commission of Partition, and also the costs of making out the title to the several parts of the said estate, be paid and borne by the Plaintiffs and the said Defendant, the infant, in the shares and proportions in which they are respectively entitled to the said estate under the said Commission; and it was ordered, that such costs of the Plaintiffs be raised by the Plaintiffs, the trustees in the settlement, made upon the marriage of the Plaintiff Calmady, by sale or mortgage of the estate in the settlement, according to the trusts of the settlement.

costs of the infant Defendant: whose costs however ought upon the same principle to be a charge upon the estate of the infant.  
[\* 556]     The old rule, that prevailed previously to that case, certainly operated as a great hardship; where one part-owner might have a single acre; and another ten thousand (1).

Sir *Samuel Romilly* and Mr. *Hall*, for the Defendants.—The Court is now called upon to lay down a new rule as to costs in a suit for partition. Formerly, in most cases costs were not given; and the rule never could have been, as represented in *Parker v. Gerard* (2), that they shall be paid in equal moieties. The case of partition has been considered as analogous to that of dower; in which there are no costa. In *Calmady v. Calmady* both at the Bar and by the Court the previous cases were distinguished into two classes; where costs had been, and where they had not been, given; and the costs of the Commission were distinguished from costs of the cause. A new rule upon this subject should not be laid down without consideration; as the effect may be mischievous: for instance, where there is an interest extremely minute, two or three acres only, and in reversion, the old rule, giving no costa, may have the salutary effect of preventing a suit by one against the inclination of all the other parties. In many cases the only way of providing for a portion of the costs may be by selling the interest; perhaps the interest of an infant, in settlement; and, if in reversion, the whole might be exhausted. The apportionment of costs ought also to extend to the interests of persons not in esse. These, and, many other, instances, show the wisdom of the old rule; and its justice; considering, that a suit for partition is admitted only as being more convenient than the Common Law writ. By the Decree in *Calmady v. Calmady* justice was done most imperfectly; as  
[\* 557]     no reason can be assigned \* for not apportioning the costs previous to the hearing, as well as the subsequent costs. The effect in this case will be, that persons, brought by the Plaintiff before the Court are to pay costs to the hearing, because they have set up a claim, which has not succeeded. The Plaintiff in this suit is bound to state, who are jointly interested with him; and there is no instance of making a Defendant so brought before the Court, pay the costs of a claim, set up by him, though mistaken. He does not appear voluntarily before the Court. This application is new in another respect: the Plaintiff desiring the costs of those, who, as the Defendants insisted, set up a claim; but who have disclaimed. The Defendants having only given notice, that such a claim was set up, ought not to pay those costs. The Plaintiff ought also to state, how the costs of those Defendants, who are not *sui juris* are to be paid: whether by a sale of their interest; or in what other manner.

The Lord CHANCELLOR [ELDON].—This is really the great ques-

(1) See *Hyde v. Hindley*, 2 Cox, 408.

(2) *Amb.* 236.

tion, how costs are to be paid on partition. Several cases have occurred since *Calmady v. Calmady*; and I wish to know, whether the practice has been uniform. It is, I apprehend, universally true, that no costs are given up to the hearing; of which I do not know an instance. As to the costs of making out the title being borne in proportion to the respective interests, that does not seem very just; as the expense may be greater of making out the title of a share, worth 50*l.*, than of one of the value of 5000*l.* On the other hand the Decrees are short in not providing, that the costs of infants and married women shall be borne by the share, in respect of which they were incurred. My impression is, that all the subsequent Decrees have followed the case of *Calmady v. Calmady*.

1811, March 15th. \* The Lord CHANCELLOR gave [\* 558] judgment upon the question of costs; declaring (1) that, as the party came into Equity, instead of going to Law, for his own convenience, the rule of Law should be adopted; and therefore no costs should be given until the Commission; that the costs of issuing, executing and confirming, the Commission, should be borne by the parties in proportion to the value of their respective interests; and there should be no costs of the subsequent proceedings.

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**BARON AND FEME—continued.**

capital ; admitting therefore expenditure, and debts, in a fair application of income, not liable to a minute account. On that principle an estate, purchased by the husband with money, partly his own, partly borrowed on his personal security, and some paid off by him, was after his death held to belong, not to the trust, but to the heir, charged for the benefit of the trust with the money, that was his own, the debts paid on account of that purchase, and expenditure in repairs, improvements, &c. *Lewis v. Madocks.*

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The application of the income, to purposes partly specified by the Founder's rules, and partly left to discretion, not being in all respects agreeable to the founder's directions, though with no improper motives, to be ascertained by a scheme; having regard, on the one hand, to the Founder's directions; on the other, to the alteration of circumstances: which might render a literal adherence to them adverse to their general object and spirit.

An alteration in the constitution of the School, with the view of reducing it to a mere parochial school, by restraining the number of foreigners, i. e. boys not on the foundation, refused: the admission of foreigners, without prejudice to the children of the poor inhabitants, being expressly directed; and the small resort of the latter not proved the result of abuse.

No objection to encourage attention to parish scholars by an allowance to the master for each.

The expenditure not to be measured by the number of parish boys, who are to be immediately benefited by it: if fairly

**CHARITY—continued.**

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The course of education and internal discipline left to the Governors and Masters. The Governors being expressly authorized to alter the founder's rules, alterations, long known and acquiesced in, presumed to have been by their authority; though the precise order does not appear. Any substantial deviation from the principle and purpose of the institution the subject of visitatorial interposition. *The Attorney-General v. The Earl of Clarendon.* 491

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CONTRACT—*continued.*

performance of a contract, is not entitled generally, to satisfaction by way of damages for the non-performance, to be ascertained by an issue, or a reference to the Master. Distinction as to the case of compensation: as for a part subject to tithes, though represented as tithe-free; giving the purchaser, if he chooses to take the purchase, a right to compensation, but not to compel the vendor to purchase the tithes. *Todd v. Gee.* 273

5. The interest, which a third party may have against the specific performance of a contract, may preclude the execution of it, as between trustee and *Cestui que Trust*; as, where an insolvent tenant made over his lease to another; who treated for a renewal under a secret agreement in trust for the original tenant.

That agreement not executed against the landlord; and the principle, that a trustee shall derive no benefit from his trust, should fail, rather than be executed against a third party, so imposed upon; though except for that interest, it would have been executed as between the other parties. 313

6. Though a parol waiver of a written contract, amounting to a complete abandonment and clearly proved, would bar a specific performance, or even parol variations, so acted upon, that the original agreement could no longer be enforced without injury to one party; variations, verbally agreed upon, are not sufficient to prevent the execution of written agreement: the situation of the parties in all other respects remaining the same.

In this case the variations were all for the advantage of the Defendant by gratuitous coven-

CONTRACT—*continued.*

ants of the Plaintiff. *Price v. Dyer.* 356

7. General rule of specific performance, that the purchaser shall have what the vendor can give; with an abatement out of the purchase-money for so much as the quantity falls short of the representation. Enforced against trustees for infants upon the mere mistake of their agent, without fraud, &c.: but the relief adapted to the justice of the case: viz. the purchase being of wood upon a gross valuation, without regard to the quantity of land, an abatement for a deficiency of quantity, from erroneously inserting the hedges and fences, not included in the purchase, was directed with reference to land merely, not wood land. *Hill v. Buckley.* 394

See Accident. Baron and Feme, 1. Corporation, 5. Interest. Lessor and Lessee, 2. Mistake, 1. Partner. Reversion. Usury.

## CONVERSION OF ESTATE.

See Equitable Interest, 1, 2.

## COPYHOLD.

1. Though the property in mines, or trees, may be in the lord of a manor, it does not follow, that he can enter, and take it without consent of the tenant. 282

2. Distinction as to supplying the want of a surrender between a lineal and collateral heir.

Not supplied for a child against a grand-child, unprovided for.

The answer stating only, that the heir inherited no other land, an inquiry was directed, whether he has a provision; and as to the nature and extent of it. *Rodgers v. Marshall.* 294

3. The want of surrender supplied in the case of a Deed, as well as a Will; but upon the same principle as in the case of a Will, or the execution of a pow-

**COPYHOLD—continued.**

er; i. e. for and against the same persons. *Rodgers v. Marshall.* 294

**COPYHOLD HEIR.**

See *Infant*, 1.

**COPYRIGHT.**

1. Distinction between the right to publish a similar work, or set up a similar trade, and the fraud of identifying it with the work or trade of another. Injunction in the latter case. 342
2. Copyright in an individual work; not in a general subject; though from its nature the consequence may be close resemblance, and considerable interference; as in the case of maps and road books. *Wilkins v. Aikin.* 422
3. Action directed, to try, whether a work on architecture was original; with a fair use of another work, by quotation and compilation; which in a considerable degree was admitted: the Injunction maintained in the mean time: viz. by permitting the sale on undertaking to account according to the result of the action. *Wilkins v. Aikin.* 422
4. Whether the copying of a map as an illustration in a fair history of all the maps of a country, would be restrained, as an invasion of copyright, *Quere.* 425

**CORPORATION.**

1. As to the validity of a by-law of the corporation, the company of Whitstable fishermen, that any freeman, engaging in any other oyster fishery on the coast of Kent, should forfeit 10*l.* and until payment should be excluded from all share of the profits, which should in the mean time be divided, as if he had wholly ceased to be a freeman, and whether such suspension is open to a *mandamus*, as a temporary disfranchisement, *quere.* *Adley v. The Whitstable Company.* 315

**CORPORATION—continued.**

2. Jurisdiction in equity against a Corporation, in nature of a partnership, in favor of a member, as well as a stranger, by an account of the profits; where there is no remedy, or not a complete remedy, at law; and the difficulty of executing the Decree from the peculiar circumstances and nature of the property will not prevent it; though that may be a ground for some modification; for instance, not recalling profits, already distributed: as an account is directed in a limited way, dispensing with vouchers, &c. upon the objection from length of time. *Adley v. The Whitstable Company.* 315
3. No instance of a by-law, restraining the individual members of the Corporation from being concerned, either in any other place, or within given limits, in the same trade. 322
4. By-law, even in restraint of trade to a certain extent, which would not have been good under the authority of charter, may be good by custom. 322
5. Distinction between charter and contract.  
That, which may be the subject of contract between the different interests in a partnership, might not be good as a by-law; for instance, an agreement among the citizens of London, who have as extensive a power of making by-laws as any Corporation, not to sell, except in the markets of London, would be good; though a by-law to that effect has been declared bad by the Legislature. 322

See *Charity*, 6, 7.

**COUNTRY BANK.**

See *Banker*, 1. *Bankrupt*, 35.

**CREDITOR AND DEBTOR.**

Assignment of property, retaining possession, fraudulent against creditors. 197

**CREDITOR, &c.—continued.**

See Bankrupt, 12, 29. Bar-  
on and Feme, 2, 3. Part-  
ner, 7, 8, 10.

**CROSS EXAMINATION.**

See Evidence, 5.

**CROSS REMAINDERS.**

1. Execution of a direction by Will to convey lands, to be pur-chased, by raising cross remainders among more than two upon the intention, by implication; without regard to the words "several and respective" in the limitation to the heirs.

Distinction upon this subject between devises by a general de-scription to a class of persons, not ascertaining the number, and to individuals named. *Green v. Stephens.* 64

2. The reasoning in the implica-tion of cross remainders upon the expression, "all the pre-mises," &c. not satisfactory. 75

**CROWN.—See Bankrupt, 35, 36.****CUMULATIVE LEGACY.**

See Legacy, 1, 5.

**D****DEBTOR AND CREDITOR.**

See Bankrupt, 12. Creditor.

**DECREE.—See Appeal, 1.****DEED.**

Sealing and delivery essential to a deed; which, if delivered, may be a good deed, whether signed or not. If to be executed un-der a power with signature and sealing, both are necessary. 459

See Evidence, 1.

**DEEDS DEPOSITED.**

See Mortgage, 2, 3, 4.

**DELIVERY.—See Deed.****DEMURRER.**

See Pleading, 2, 3, 4, 5.

**DEMURRER (ORE TENUS).**

See Pleading, 2.

**DENIAL.—See Bankrupt, 31, 34.****DEPOSIT OF DEEDS.**

See Mortgage, 2, 3, 4.

**DESCENT AFTER DISSEISIN.**

See Infant, 1.

**DEVISE.**

Ante, Vol. XII. 419.

1. Devise by very general words, "all messuages, lands," &c. and all other his real and personal estate, included money, in trust to be invested in land, and settled, though particularly charg-ed on the estates devised. *Green v. Stephens.* 64

2. Distinction between a legal de-vise and an executory trust by Will: in the latter the actual intention, if it is to be collect-ed, is regarded in a much greater degree than in the construc-tion of a legal devise by the same instrument. 76

3. Mortgage in fee after a devise a revocation *pro tanto* only. 134

4. Execution of a devise under the Statute of Frauds; requiring signature by the devisor in the presence of three witnesses, and their attestation of his act by their subscription. 458

5. Attestation of a devise by a mark good within the Statute of Frauds. 459

6. Sealing not necessary to the ex-ection of a devise under the Statute of Frauds; nor suffi-cient without signing. 459

See Cross Remainders. Heir. Possibility. Trust, 1.

**DISCOUNT.—See Banker, 1.****DISSEISIN.—See Infant, 1.****DORMANT PARTNER.**

See Bankrupt, 28. Partner, 8.

**DOUBLE LEGACY.**

See Legacy, 1, 5.

**DOUBLE PORTION.**

See Satisfaction, 1, 2.

**DOUBLE SUIT.—See Practice, 3.****DOWER.—See Partition, 4.****E****ELEEMOSYNARY CORPORA-TION.—See Charity, 6, 7.****EMBEZZLEMENT.—See Lien.**

**EQUITABLE INTEREST.**

1. Conveyance to trustees, in trust to sell, and purchase other estates, to be settled. Those, entitled under the limitations directed of the estates to be purchased, have equitable interests co-extensive until a sale. Therefore a specific performance was decreed of an agreement for partition against an objection to a title under a fine by a person, who would have been tenant in tail of the estates to be purchased, the effect being an election to keep the estate; binding the trustees; though it may be questionable, whether they could take upon themselves to convey in fee to a person, entitled to an estate tail only.

*Pearson v. Lane.* 101

2. Money, given to be laid out in land to be conveyed, or land to be sold, and the produce paid, to A.: though in the one case the money is not given to him, and in the other no interest expressly in the land, he is in equity the owner; and may elect to have the money, or the land conveyed, as he shall direct. 104

See Insurable Interest.

**EQUITABLE JURISDICTION.**

See Jurisdiction, 1.

**EQUITABLE MORTGAGE.**

See Mortgage, 2, 3, 4, 5.

**EQUITABLE WASTE.**

See Waste.

**ERROR.**

See Mistake. Review, 2, 3.

**EVIDENCE.**

1. The existence and execution of a settlement by indentures of lease and release presumed from circumstances: principally the existence of the drafts; the statement in an abstract of the title; and the existence of the lease for a year of other estates, appearing to have been included in the same plan of settlement. *Ward v. Garnons.*

**EVIDENCE—continued.**

2. The production of a paper, importing to be an attested copy, may with other evidence have considerable weight. 140

3. Whatever is wanting to show the consideration, and from whom it moves, may be supplied by evidence *dehors* the deed; where such evidence does not contradict the deed. 192

4. Objection to an award, to be ready to be delivered in writing, to the parties by a certain day, as not having a deed stamp, overruled. 232

5. Cross-examination as to the execution of deeds.

Order in the alternative, either that the examiner, with whom they were, should cross-examine; or that they should be delivered to the examiner for the other party for that purpose. *Turner v. Burleigh.* 354

6. Power of the Court of Chancery to examine *viva voce.* *Ib.* 354

7. Re-examination not of course: but at the discretion of the Court on special application. *Purcell v. McNamara.* 434

8. Order, after decree on behalf of a Defendant, for the examination of another Defendant upon interrogatories, who had been examined, and cross-examined; restrained to such of the points in the cause, to which she had not been examined, as the Master should think reasonable. *Ib.* 434

9. Interrogatories for examination of a party settled by the Master. *Ib.* 434

10. Under a power of sale with consent of parties, testified by any writing or writings under their and his hands and seals, &c. attested by two or more witnesses, the attestation, going only to sealing and delivery, held not sufficient: nor a sub-

**EVIDENCE—continued.**

- sequent attestation, that they also signed: but a case was directed.\* *Wright v. Wakeford.* 454
- 11. Power to be executed by a deed, signed and sealed in the presence of witnesses, and the deed expressed to be so executed, though the attestation appeared to be only to the sealing and delivery, signature in the presence of the witnesses presumed. 458  
See *Devise*, 5, 6, 7. *Executor*, 8, 9. *Mortgage*, 2. *Satisfaction*, 1. *Will*, 2.

**EXAMINATION.**

See *Evidence*, 5.

**EXCEPTIONS.—See Practice, 1.****EXECUTION.**

- 1. Separate execution under joint Judgment. 413
- 2. Execution against joint property; though the foundation of the action had no relation to the joint concern. 413  
See *Bankrupt*, 12. *Devise*, 4, 5, 6, 7. *Evidence*, 10, 11. *Partner*, 7.

**EXECUTOR.**

*Ante*, Vol. XIV. 353.

- 1. Pledge by executors of bonds to the testator upon advances from time to time for several years.

Decree at the Rolls, dismissing a bill, not by creditors or legatees, but by co-executors, who had not previously acted, affirmed by the Lord Chancellor on Appeal, *M'Leod v. Drummond*. 152

- 2. Generally, a purchaser from an executor not bound by his misapplication of the money: nor in many cases even of pledge, if free from fraud, or direct evidence on the face of the transaction of an intended misapplication. 154
- 3. Upon a deposit by executors of the testator's property with their

\* See the note, page 369.

**EXECUTOR—continued.**

- own for their own debt the latter to be first applied. 158
- 4. Effect of length of time against a demand in respect of misapplication of assets by the executor. 165
- 5. Security by executor upon the assets for his own debt and future advances, with other circumstances, proving the act not to be consistent with the duty of executor, but for his own advantage, cannot be held. 168
- 6. Testator's effects cannot be taken in execution for the executor's debt. 168
- 7. Pledge of the assets by an executor cannot be held, even against a pecuniary or residuary legatee, and though for money, advanced at the time, if under circumstances, showing knowledge of an intended application, not conformable to, or connected with, the character of executor.

Distinction between an antecedent debt and a present advance, as the consideration, not conclusive. 170

- 8. Executor, having general and specific legacies not expressly for his care, &c. was not precluded from giving evidence of the intention, that he should have the residue beneficially, by an exception of plate out of furniture, bequeathed to him, and by a bequest to him of a contract for a leasehold house, subsequent to the appointment of executor: the effect being only, that he should not take the plate under that bequest of furniture; and a future disposition of the residue might have been contemplated.

Upon the evidence, raising no direct intention in his favor, but mere inference from equivocal declarations, with an intention to make an express residuary disposition, the executor de.

**EXECUTOR—continued.**

- clared a trustee of the residue for the next of kin. *Langham v. Sanford.* 435  
**9.** Executor, having a legacy expressly for his care, &c. cannot produce evidence of intention, that he should take the residue beneficially. 443  
**10.** Effect of the distinction upon a legacy to a person by name, or by the description of executor: in the latter case he takes in that character, with all the consequences. 466  
 See Legacy, 2, 3.

**EXECUTORY TRUST.**

See Devise, 2.

**EXPECTANT HEIR.**

See Reversion.

**EXTENT.—See Bankrupt, 35, 36.****F****FAILURE or ISSUE.**

See Perpetuity.

**FATHER.—See Satisfaction, 1, 2.****FELONY.—See Lien.****FINE.—See Infant, 1, 2.****FORECLOSURE.**

See Mortgage, 6.

**FORFEITURE.—See Infant, 1.****FRAUD.**

See Baron and Feme, 2, 3. Contract, 5. Copyright, 1.

**FRAUDS (STATUTE OF).**

See Devise, 4, 5, 6.

**FRAUDULENT ASSIGNMENT.**

See Bankrupt, 11. Creditor and Debtor, 1.

**FURNITURE.**

See Baron and Feme, 3.

**G****GENERAL WORDS.**

See Statute.

**GOOD-WILL.**

See Bankrupt, 22. Vendor and Vendee, 4.

**H****HARROW SCHOOL.**

See Charity, 6.

**HEIR.**

Devise and bequest of real and leasehold estates to the devisor's widow and her heirs for ever, "in the fullest confidence that after her decease she will devise the property to my family," held an estate for life only; with remainder in trust for the devisor's heir, as *persona designata*. *Wright v. Atkyns.*\* 255  
 See Charity, 4. Reversion.

**I****ILLEGITIMATE CHILD.**

See Bastard.

**IMPROPRIATOR.—See Tithe, 1.****INADEQUACY.—See Reversion.****INCLOSING ACT.**

See Jurisdiction, 3. Vendor and Vendee, 5.

**INFANT.**

- Exception out of Common Law bars or forfeitures, by fine, final judgment in a writ of right, descent after disseisin, copyhold heir not coming in to be admitted upon the proclamations, in favor of infancy, non-sane memory, or absence beyond sea. 89
- Where the words of a law in their ordinary signification are sufficient to include infants, the virtual exception must be drawn from the intention of the Legislature, manifested by other parts of the Law, from the general purpose and design of the Law, and the subject-matter of it.

Thus the Statutes of Limitation and of fines would have bound infants, &c. without an express exception. 92

See Infant Trustee. Review, 2. Waste.

\* Reversed. See the note, page 263.

## INFANT TRUSTEE.

1. Infant trustee within the Statute 7 Ann. c. 19, notwithstanding an interest, as co-executor, and co-residuary legatee, entitled to the mortgage-money: the receipt and discharge of the other executor leaving the infant a mere trustee. —————  
*v. Handcock.* 383
2. Infant trustee within the Statute 7 Ann. c. 19, must be a dry trustee. 384
3. Conveyance by infant trustee voidable, as not within the Statute; if he would be bound to convey, when adult, he would in Equity be restrained from setting it aside. 384

## INJUNCTION.

- 1 Injunction in trespass: where the title was disputed. *Kinder v. Jones.* 110
2. Injunction against trespass upon irremediable mischief, in nature of waste, on a bill by the lord of a manor and his lessees against taking stones, having a peculiar value, found at the bottom of the sea within the limits of the manor. *Earl Cowper v. Baker.* 128
3. Injunction in the case of trespass by the lord of a manor digging for coal on the premises of a copyhold tenant.

From the nature of the subject and the consequences such an Injunction not to be continued without securing the means of a speedy trial. *Grey v. The Duke of Northumberland.* 281

4. Breach of Injunction by proceeding against bail. *Leonard v. Attwell.* 385

See Copyright, 3, 4.

## INSURABLE INTEREST.

Equitable interest insurable: both trustee and *cestui que trust* have an insurable interest. 253

## INTEREST.

1. Under a written contract for a sum of money, payable on demand, or a day certain, interest

## INTEREST—continued.

- is in equity, as at law, payable from the time of demand made, or from the fixed period of payment. *Louwdes v. Collens.* 27
2. Interest at 5 per cent. under a contract to give promissory notes. *Louwdes v. Collens.* 27
3. Interest beyond the penalty of a bond upon a mortgage for the same debt; though by a surety. *Clarke v. Lord Abingdon.* 106  
See Insurable Interest. Revision, 1.

## INVENTORY.

See Baron and Feme, 3.

## ISSUE.—See Perpetuity.

## J

## JAMAICA.—See Limitation, 1.

## JOINT AND SEPARATE COMMISSION.

See Bankrupt, 28, 29.

## JOINT CREDITOR.

See Bankrupt, 12, 13, 19, 40.  
Partner, 9.

## JOINT JUDGMENT.

See Execution, 1.

## JOINT PROPERTY.

See Bankrupt, 12.

## JUDGMENT.—See Execution, 1.

## JURISDICTION.

1. Equitable jurisdiction to order a deed, forming a cloud upon a title, to be delivered up though void at law.

Accordingly a demurrer to a Bill, to have a deed fraudulent and void, as in contemplation of bankruptcy, delivered up, was over-ruled. *Hayward v. Dimsdale.* 111

2. Distinction between directing an instrument to be delivered up, and making it effectual in equity. 167
3. Commissioners under an Inclosing Act liable to suits at law and in equity for acts, not according to their authority.

Demurrer to a Bill upon that principle, charging, not collu-

JURISDICTION—*continued.*

sion expressly, but that they were proceeding to divide unjustly, and not according to their authority, viz. upon the information of a tenant of the Plaintiff's manor, being owner of the adjoining one; and the boundaries and documents being intermixed, over-ruled. *Speer v. Crauter.* 216

See Arbitration, 3. Charity, 6, 7.

## L

## LACHES.

See Corporation, 2. Executor, 4. Limitation, 3, 4. Reversion.

## LAND.—See Copyhold, 1.

## LANDLORD AND TENANT.

See Lessor and Lessee.

## LAPSE.—See Legacy, 1.

## LAY IMPROPRIATOR.

See Tithe, 1.

## LEGACY.

1. Legacies to the same persons by distinct instruments accumulative: subject to be repelled by internal evidence; as where the same sum is given for the same cause: whether by the mere equality of amount, *Quær Benyon v. Benyon.* 34

2. Right of pecuniary or residuary legatee to follow the assets in case of misapplication, where a creditor or specific legatee could. *M'Leod v. Drummond.* 169

3. Lien of residuary legatee on the specific fund. 169

4. By the law of Scotland, as well as of England, a legacy lapses by the death of the legatee in the testator's life. 351

5. Double legacies, though of equal amount, with circumstances of difference, as in the times of payment of annuities, half-yearly and quarterly, accumulative: not, if exactly similar; though by different instruments. *Currie v. Pye.* 462

LEGACY—*continued.*

6. Devise in trust to pay several persons 1000*l.* each: on the death of any in case of a deficiency the others abate: but if to pay debts and legacies, and one legatee dies, the trust is for the other legatees, if necessary. 466

See Charity, 4. Executor, 10. Satisfaction, 1.

## LENGTH OF TIME.

See Executor, 4. Limitation.

## LESSOR AND LESSEE.

1. Obligation of tenant to take care of the rights of his landlord. 225

2. An agreement for a lease, for seven, fourteen, or twenty-one, years, gives the option to the lessee alone. 363

See Contract, 5. Notice, 2.

## LIEN.

Bill, following life insurances, effected by the Plaintiff's clerk with the Plaintiff's money, procured by embezzlement, and transferred to the Defendants, for valuable consideration, but with notice.

Demurrer allowed; the transaction amounting to felony by the Statute 39 Geo. III. c. 85; and therefore not raising a civil contract: secondly, the policies not being the Plaintiff's property. *Cox v. Paxton.* 329

See Legacy, 2, 3. Partner, 1. 10.

## LIMITATION.

1. Effect of the Statute of Limitations, or possessory law, of Jamaica, (beyond the Statutes of Limitations in this Country): barring not merely the legal remedy, but any suit, claim, or demand: converting seven years' possession into a positive, absolute, title.

No exception in favor of absentees; not being with the exception expressed; as there was no such exception out of the Statutes of Limitation in this

**LIMITATION—continued.**

Country ; until expressly given by Statute 4 Ann. c. 16. s. 19.

The exception in the law of Jamaica relating to trustees, means actual, not constructive, trusts.

The exception as to tenants for life not applicable, where they could convey the fee under a power of sale. *Beckford v. Wade.* 87

2. Though the Courts of Justice were shut up in time of war, so that no original could be sued out, the Statute of Limitation continues to run. 93

3. Effect of length of time in Equity by analogy to the Statutes of Limitation ; though not directly affecting trusts. 96

4. Though no time bars a direct trust, as between *cestui que trust* and trustee, a constructive trust barred by long acquiescence ; though the true state of the fact may be easily ascertained, and the ground of original relief was clear ; and even arising out of fraud. 97

5. Redemption barred by twenty years' possession without impediment to the mortgagor, or ten years after impediment removed. 99

See Infant, 2.

**LIMITATION REMOTE.**

See Perpetuity.

**LORDS, HOUSE OF.**

See Appeals.

**LUNACY.—See Infant, 1.****M****MANDAMUS.**

See Corporation, 1,

**MAP.—See Copyright, 2, 4.****MARSHALLING.**

See Bankrupt, 40.

**MEMBER OF PARLIAMENT.**

See Privilege.

**MERCHANTABILITY'S CLERK.**

See *Ijen.*

**MESSENGER.**

See Bankrupt, 3, 4, 5.

**MINE.**

See Copyhold, 1. Injunction, 3.

**MISDESCRIPTION.**

See Mistake, 2.

**MISTAKE.**

1. Society for raising an annuity fund for the members : the rate of subscription being too low, though the subsisting fund was equal to the annuities, then payable, and no adequate remedy by the articles, inquiries were directed ; 1st, to ascertain the state of the society, the defect of the plan, &c. ; secondly, to provide a remedy : viz. by additional subscription, adequate to the object by paying the arrears, and providing for the present and future annuities. *Pearce v. Piper.* 1

2. Revocation of an annuity, and substitution of another, notwithstanding a misdescription ; no other annuity or instrument appearing. *Benyon v. Benyon.* 34

**MODUS.—See Tithe.****MORTGAGE.**

1. An equity of redemption is within the exception in the Annuity Act, (Statute 17 Geo. III. c. 26. s. 8).\* *Tucker v. Thurstan.* 131

2. Equitable mortgage by a deposit of deeds ; covering subsequent advances : upon evidence, that they were made upon that security. *Ex parte Langston.* 227

3. Equitable mortgage by a deposit of deeds upon an advance of money without a word passing. 230

4. Equitable mortgage by deposit of deeds not favored ; especially when contradicting a written instrument. *Ex parte Coombe.* 369

5. Equitable mortgage by deposit of deeds. *Monkhouse v. The Corporation of Bedford.* 380

6. The time not enlarged upon a

\* Repealed. See the note, page 132.

**MORTGAGE—continued.**

Bill of Redemption; as upon a Bill of Foreclosure. *Novosielski v. Wakefield.* 417

See *Device*, 3. *Limitation*, 5.

**MOVABLES.**

See *Baron and Feme*, 3.

**N****NATURAL CHILD.**

See *Bastard*.

**NEXT OR KIN.**

See *Executor*, 8, 9.

**NON DECIMANDO.**

See *Tithe*, 1.

**NONSANNE MEMORY.**

See *Infant*, 1.

**NOTE.—See Interest**, 2.**NOTICE.**

1. Specific performance of a contract to purchase enforced against a subsequent purchaser, at an advanced price, with notice; who was decreed to convey on payment to him of the price, for which the Plaintiff contracted. *Daniels v. Davison.* 433

2. The possession of a tenant is notice to a purchaser of the actual interest he may have; either as tenant; or farther, as in this instance, by an agreement to purchase the premises. *Daniels v. Davison.* 433

**P****PARENT AND CHILD.**

See *Satisfaction*, 1, 2.

**PARLIAMENT.—See Privilege.****PAROL EVIDENCE.**

See *Evidence*. *Satisfaction*, 1.

**PAROL WAIVER.**

See *Contract*, 6.

**PARTITION.**

1. Decree for partition among several joint proprietors; and no objection from a covenant not to inclose without general consent, rights of common, and the

**PARTITION—continued.**

inequality and uncertainty of the shares in proportion to other estates.

The Decree directed a reference to the Master to inquire, whether the Plaintiff and Defendants, or any and which, are entitled; and in what shares, according to the respective values of the other estates: and then a Commission to divide accordingly; the costs of the partition to be borne by the parties in proportion to the value of their respective interests; and no previous or subsequent costs; by analogy to the proceeding at law. *Agar v. Fairfax.* 533

2. Upon a Bill for Partition the interests and proportions to be ascertained by the Court; not the Commissioners. 543

3. A partition never affects third parties: rights of common for instance. 544

4. Commission to make partition not under the authority of any Act of Parliament; but from the difficulty attending partition at law; where the Plaintiff must prove his title; as he declares: and also the titles of the Defendants; by analogy to the equitable jurisdiction in the case of dower. 522

**PARTNER.**

1. Equitable right of partners, subject to the joint debts; depending upon the result of the account between them.

Therefore under a joint Commission of Bankruptcy the separate estate of one has a lien on the other's share of a surplus of the joint estate in respect of a debt, proved under bills, drawn in the name of the firm for a separate debt: and may come in with the other separate creditors for the deficiency. *Ex parte King.* 115

2. A partnership, without articles and for an indefinite period

PARTNER—*continued.*

may be dissolved by any partner, at any time, without previous notice; subject to the engagements of the partnership: but the existence of engagements with third persons cannot prevent the right of dissolution, as among themselves.  
*Featherstonhaugh v. Fenwick.* 298

3. The consequence of the dissolution of partnership, where there are no articles, prescribing the terms, is a general sale and account of the joint property: one or more partners therefore cannot insist on taking the share of another at a valuation; or, that he shall remove his proportion from the premises; thereby securing the good-will.  
*Ib.* 298

4. Partner after dissolution of the partnership continuing to trade with the joint property, must account for the profits. *Ib.* 298

5. Lease of premises, where a partnership trade was carried on, renewed by one partner in his own name clandestinely, a trust for the partnership; to be accounted for as joint property.  
*Ib.* 298

6. Distinction as to partners; with reference to third persons, and as between the partners themselves.

Partner as to third persons by a specific interest in the profits, as such: not by receiving a sum of money: even in proportion to a given share of the profits. *Ex parte Hamper.* 403

7. Execution by a separate creditor against joint property; subject to account; ascertaining the specific interest of the partner in the joint effects. 407

8. Dormant partner, not an ostensible contracting party; a creditor may, but is not bound to, go against him. 412

9. A partner cannot claim in competition with the joint creditors.

521

PARTNER—*continued.*

10. Creditors, as such, independent of special contract, have no lien or charge on the effects; but in the distribution of joint estate obtain payment through the equities of the partners among themselves. 526

See *Bankrupt*, 6, 12, 28, 40.  
*Corporation*, 2, 5. *Execution*, 2.

## PAUPER.

Notice of motion by a party *in forma pauperis* must be signed by the Clerk in Court. *Gardiner v. \_\_\_\_\_.* 387

## PERPETUITY.

1. Testatrix gave all her estate real and personal to her daughter and her heirs and half the Navigation money for her natural life, and in case she dies without issue all to be divided between four nephews and nieces, named: the part of one only for life, and to be divided between the survivors.

The limitation over too remote, there being no expression, or circumstance to limit the generality of the words to a failure of issue at the time of the death.

As to what property it extends to, *Quare. Barlow v. Salter.* 479

2. The words "die without issue" have their legal signification: viz. a general failure; unless there are expressions, or circumstances, from which it can be collected, that they are used in a more confined sense. 482

3. Though, where nothing but a life-interest is given over upon a failure of issue, it must necessarily be intended a failure within the compass of that life, where the entire interest is given over, the mere circumstance, that one taker is confined to a life-interest, furnishes no indication of an intention to make the whole bequest depend on

PERPETUITY—*continued.*

- the existence of that person, when the event happens, on which the limitation over is to take effect. 482
4. Devise for life, and, in default of issue, to another for life; and, in default of his issue, remainder over: the limitation over void as to the personal property: either as too remote; or as an estate-tail by implication. 484

## PETITION.—See Practice, 4.

## PLEADING.

1. Demurrer allowed to a supplemental Bill; as stating circumstances, subsequent not only to the original Bill, but to publication; first, as not properly supplemental matter: secondly, as not material.

If material, the benefit might be obtained in another shape: perhaps by a special application for the opportunity of examining witnesses, or a Bill of Discovery; as the object may be discovery only, or also relief; and in that case that the answer or evidence may be read at the hearing. *Milner v. Lord Harewood.* 144

2. To a Bill by an heir, against a claim under a devise, for a discovery, and that the witnesses may be examined *de bene esse*, and their testimony recorded, a general demurrer for want of equity being allowed, the Defendant was not permitted to demur *ore tenus* as to the examination of witnesses; not being made the subject of demurrer on the Record. *Pitts v. Short.* 213

3. General demurrer lies, where the Plaintiff, though entitled to discovery, is not entitled to relief. 216

4. The rule, that the Plaintiff being entitled to discovery only, and not to the relief, a general demurrer lies, does not prevent

PLEADING—*continued.*

a demurrer to the relief, giving the discovery. *Todd v. Gee.* 273

5. Demurrer, not good in part, and bad in part: therefore going to relief, to which the Plaintiff was entitled, over-ruled generally: the Plaintiff, a purchaser, not being barred by a Report against the title in another suit, upon a Bill against him by the vendors. *Todd v. Gee.* 273

See Review. Tithe, 4. Vendor and Vendee, 2.

## POOR RELATIONS.

See Charity, 3.

## PORTION.—See Satisfaction, 1, 2.

## POSSIBILITY.

Possibility a present interest; and capable of devise. 182

## POWER.

- Execution of a power is a limitation of a use; which must arise, if at all, at the time of execution; and is, as if expressed in the original settlement. 457

See Bankrupt, 26, 37. Deed. Evidence, 10, 11. Vendor and Vendee.

## PRACTICE.

1. Construction of the General Order (23d January, 1794).

Defendant, after exceptions allowed, not having previously come under terms, is entitled of course to one order for time: the General Order not attaching before the second application for time to answer an amended bill, or after exceptions allowed. *Wells v. Powell.* 113

2. Plaintiff, under an undertaking to speed his cause, obtained an Order to withdraw his replication, and set down on Bill and Answer; but did not serve a subpoena to hear judgment; or appear, when the cause was called.

The Bill was dismissed with costs. *Rogers v. Goore.* 130

3. Reference, whether two suits are for the same matter, is ob-

|   |  |
|---|--|
| <b>PRACTICE</b> — <i>continued.</i>   | <b>REGISTRY (SHIP)</b> — <i>continued.</i>   |
| tained by plea, in Chancery, as<br>in the Exchequer; not by Mo-<br>tion. <i>Murray v. Shadwell.</i> 353   | bankruptcy or death. <i>Ex par-</i><br><i>te Houghton and Gribble.</i> 251   |
| 4. Petition failing as to the prin-<br>cipal objects, dismissed gener-<br>ally. 376   | <b>RELATIONS.</b> —See Charity, 3.   |
| 5. Reference of title on Motion<br>in a simple case of specific per-<br>formance, when nothing more. 278  | <b>REMAINDER.</b>  |
| See Appeal. Pauper. Re-<br>view.  | See Cross-Remainder.   |
| <b>PRESCRIPTION IN NON DE-<br/>CIMANDO.</b>   | <b>REMOTE LIMITATION.</b>  |
| See Tithe, 1.   | See Perpetuity.  |
| <b>PRESUMPTION.</b>   | <b>RENEWAL.</b>  |
| See Evidence, 1. Satisfaction.  | Settlement of a renewable lease<br>in trust out of the rents and<br>profits to pay the fines and char-<br>ges of renewing; and, subject<br>thereto, for husband and wife<br>successively for life: remainder<br>to the first son at twenty-one   |
| <b>PRIVILEGE.</b>   | The trustees not having re-<br>newed in the lives of the ten-<br>ants for life, answerable, as for<br>a breach of trust; though not<br>deriving any benefit from it: li-<br>able therefore, with the assets<br>of the tenants for life, with re-<br>ference to their enjoyment, and<br>the occupying tenant, having<br>purchased the husband's life in-<br>terest, to procure a renewal for<br>the son: the trustees indemnified<br>against the expense by an<br>application of the assets of the<br>tenants for life in the first in-<br>stance: but the occupying ten-<br>ant not charged in their favor.<br><i>Lord Montfort v. Lord Cad-</i><br><i>ogan.</i> 485 |
| <b>PROMISSORY NOTE.</b>   | <b>RESIDUE.</b> —See Executor, 8, 9.   |
| See Interest, 2.  | <b>RESIDUARY LEGATEE.</b>  |
| <b>PUBLIC SCHOOL.</b>   | See Legacy, 2, 3.  |
| See Charity, 6.   |  |
| <b>PURCHASER.</b>   | <b>RESULTING TRUST.</b>  |
| See Accident. Contract. Execu-<br>tor, 2. Notice, 1. Vendor and<br>Vendee.  | See Trust, 1.  |
| R   | <b>REVERSION.</b>  |
| <b>REDEMPTION.</b>  | The sale of a reversionary inter-<br>est, in this Court considered as<br>the case of an expectant heir,<br>forms an exception to the gen-<br>eral rule, that for mere inad-<br>equacy of value a contract is not<br>to be set aside.   |
| See Limitation, 5. Mortgage, 6.   |  |
| <b>RE-EXAMINATION.</b>  | During the continuance of the<br>same situation acquiescence has<br>no effect; and the value is to be<br>estimated at the time of the trans-<br>action: not according to the<br>event.   |
| See Evidence, 7, 8.   |  |
| <b>REGISTRY (SHIP).</b>   |  |
| The registry of a ship is conclu-<br>sive evidence of the property,<br>even between creditors; exclud-<br>ing all trusts, created by act of<br>the parties; as, by payment of<br>money on a purchase in the<br>name of another. |  |
| Distinction, as to trusts, aris-<br>ing by operation of law, upon   |  |

REVERSION—*continued.*

Interest at 5 per cent. upon  
the money advanced. Compound  
interest refused. *Gow-*  
*land v. De Faria* 20

## REVIEW.

1. Bill of Review may be also a Bill of Revivor and Supplement. *Perry v. Phelps.* 173
2. Error apparent, to support a Bill of Review, must be plain and obvious; as a Decree against an infant without a day to show case: not merely an erroneous judgment; which might be the subject of a re-hearing. *Perry v. Phelps.* 173
3. Whether a Bill can be maintained as a Bill of Review, in case the Decree should have been enrolled, or, if not, as a Bill of Revivor and Supplement, with a prayer in the alternative, adapted to either case; whether there is any instance of a Bill in the nature of a Bill of Review upon error apparent, or matter of law, to be collected from the pleadings and evidence, a supplemental bill being required only to introduce new facts, to come on with a re-hearing of the original cause, *Querc. Perry v. Phelps.* 173
4. For a Bill of Review on newly-discovered facts the leave of the Court necessary. 173
5. Distinction between a Bill of Review and a supplemental Bill in nature of it. If the Decree is enrolled, it is strictly a Bill of Review; and prays, that the Decree may be reviewed and reversed: if not enrolled, the prayer is, that the cause may be re-heard. In either matter of supplement or revivor may be introduced, with the proper prayer. 177

REVIVOR.—See Review, 1, 3, 5.

ROAD-BOOK.—See Copyright, 2.

## S

## SATISFACTION.

1. Satisfaction of a legacy by a parent to a child by a portion of the same amount, though with some circumstances of difference.

Whether parol evidence can be admitted originally of an intention to substitute the one provision for the other, or only where it is first offered against the presumption, it is clearly admissible to show, that the father was the author of the portion: viz. by stipulating on joining in the marriage settlement of his eldest son for a charge, and giving up interests in consideration of it. *Hartopp v. Hartopp* 184

2. In the case of double provisions by a father for a child slight circumstances of difference not regarded. 191

## SCHOOL (PUBLIC).

See Charity, 6.

## SCOTLAND.—See Legacy, 1.

## SEALING AND SIGNING.

See Deed. Devise, 6.

## SEPARATE ESTATE.

See Baron and Feme, 4.

## SEPARATE AND JOINT COMMISSION.

See Bankrupt, 28, 29.

## SETTLEMENT.

See Baron and Feme, 2.

## SHIP REGISTRY.

See Registry.

## SHORT BILLS.

See Banker, 2. Bankrupt, 35.

## SIGNING AND SEALING.

See Deed. Devise, 6.

## STAMP.

See Bankrupt, 17. Evidence, 4.

## STATUTE.

1. General words in a Statute must receive a general construction; unless there is in the Statute itself some ground for restraining their meaning by reasonable construction, not by arbitrary addition or retrenchment. 91

**STATUTE—continued.**

2. The preamble of an Act of Parliament, though it may assist ambiguous words, cannot control a clear and express enactment. *Lees v. Summersgill.* 508

See *Infant*, 2.

**STATUTE OF FRAUDS.**

See *Devise*, 4, 5, 6.

**STOCK.—See Usury.****SUPERSEDEAS.**

See *Bankruptcy*, 1, 2.

**SUPPLEMENTAL BILL.**

See *Pleading*, 1. *Review*, 1, 3, 5.

**SURRENDER.—See Copyhold.****SURVIVOR.**

The word "Survivors" construed  
"others." 482

**T****TENANT.**

See *Copyhold*, 1. Lessor and Lessee. *Notice*, 2.

**TIMBER.—See Copyhold 1.****TIME.**

See *Corporation*, 2. *Executor* 4.  
*Limitation*, 3, 4.

**TITHE.**

1. To a Bill for tithes, even by a Lay Impropropriator, prescription *in non decimando*, or presumption from mere retainer, without color of title, is no defence; and will not be sent to Law. *Berney v. Harvey.* 119

2. Issue directed to try *Moduses*: alleged variations in some of the payments appearing to be only irregularities in the collection. *Blackburn v. Jepson.* 473

3. As to a *Modus* of 1d. for tithe of all hay, *Quere*. *Blackburn v. Jepson.* 473

4. *Modus* for every garden and orchard in lieu of all tithes of all titheable matters or things arising therein, sufficiently laid without stating them to be ancient gardens, &c. and not too extensive. *Blackburn v. Jepson.* 473

**TITHE—continued.**

5. *Modus* of 4d. by each occupier, having lands, cultivated by the plough by three or more horses, usually called a plough, in lieu of all small praedial tithes of all such lands so cultivated, bad for uncertainty as to the quantity of land. *Blackburn v. Jepson.* 473

6. *Modus* disproved by the evidence: for every cow producing a calf 1 1-2d.; or if no calf 1d.: the evidence proving a higher payment beyond a certain number: Account of tithes decreed. *Blackburn v. Jepson.* 473

7. *Modus*, supported by the evidence in part, not as to the rest, and capable of distinction, void *in toto*; viz. so much for every calf, up to seven, proved; and different sums proved from those laid as to other numbers. 478

**TRADE.**

See *Bankrupt*, 22. *Copyright*, 1.  
*Vendor and Vendee*, 4.

**TREES.—See Copyhold, 1.****TRESPASS.**

See *Injunction*, 1, 2, 3.

**TRUST.**

1. Resulting trust for the heir; the only express devise being to convey to the devisor's son from and after his age of thirty; which he did not attain; and no devise by implication from a declaration, that he shall have no power over the estate until his age of thirty. *Nash v. Smith.* 29

2. Ante, Vol. IV. 108. Trustee for the purchase of land died without personal assets; having purchased land.

If the trust could have been executed during his life, which upon the construction was questionable, yet, no part of the trust-fund being traced, and the circumstances affording no presumption, that the purchases

**TRUST—continued.**

were made in execution of the trust, they were held not liable.

*Perry v. Phelps.* 173

See Devise, 2. Heir. Infant Trustee. Insurable Interest. Limitation, 4. Registry (Ship). Renewal.

**TRUST EXECUTORIAL.**

See Devise, 2.

**U****USURY.**

Contract for re-payment of a debt with legal interest, or at the option of the creditor to transfer so much stock as it would have produced on the day it was payable, void as usurious: the principal and interest being secured, with a chance of a rise of the stock: not therefore like a contract to replace stock absolutely, which might fall. *Barnard v. Young.* 44

**V****VENDOR AND VENDEE.**

1. Purchaser not compelled to take a doubtful title: viz. by executing a power of sale, introduced under a direction by a decree, establishing a Will, to the Master to approve a proper settlement; the Will not authorizing the insertion of such a power: nor could it be sustained under a power by a former settlement; which, if not extinct by the failure of the limitations, and the union of the estate for life with the reversion, could not be duly applied to purposes, clearly foreign to its original object: and, though purchasers are not put to exercise a very nice and critical judgment with regard to the purposes, for which powers are created, it could never be inten-

**VENDOR, ETC.—continued.**

ded to refer to a perfectly new set of limitations, in a new settlement, at a long subsequent period, under a disposition by the Will of the owner of the fee; to be exercised, not for any purpose, in the least degree connected with the settlement, but avowedly as an expedient to supply the want of a valid power in that settlement; and enable those, whom he had made only tenants for life, to dispose of the estate. *Wheate v. Hall.* 80

2. No instance of the plea of purchase for valuable consideration, without notice, without an averment, that the party purchased from a person, seised, or pretending to be seised, in fee. 290
3. Purchaser of a lease, though not considered a purchaser for valuable consideration without notice to the extent of not being bound to know, from whom the lessor derived his title, is not to take notice of all the circumstances, under which it is derived.

Therefore understood to have notice; that the lessors were trustees for a charity; not that the lease was bad; that depending on circumstances *dehors.* 298

4. Sale of a trade with the good-will does not prevent the vendor's setting up again a similar trade, without express covenant; or fraud; by representing it as a continuation of the old trade, or by conduct encouraging others to involve themselves in the confidence, that he would not trade again; &c. *Crutwell v. Lye.* 335
5. Objection by a purchaser of allotments under an Inclosing Act, that the award of the Commissioners was not made, overruled: the Act containing a clause, enabling a sale, and declaring the conveyance valid,

**VENDOR, ETC.—continued.**  
 before the award ; and, supposing the possibility of the Commissioners varying the allotments, the purchaser having full notice of all the circumstances. *Kingsley v. Young.* 468  
 See Accident. Charity, 6, 7.  
 Contract. Executor, 2. Notice, 1.

## W

**WAIVER.**—See Contract, 6.  
**WASTE.**

Devise in strict settlement, with a clause of forfeiture by cutting any trees.

Upon a Bill by the infant remainder-man in tail an inquiry was directed, whether any trees, in the park, not ornamental, or affording shelter to the mansion-house, are proper to be felled ; and whether it would be for the benefit of all parties interested, that they should be felled, and sold ; and the money laid out in other estates, to be settled to the

**WASTE—continued.**  
 same uses. *Delapole v. Delapole.* 150

See Injunction, 2.

**WEST INDIES.**

See Limitation, 1.

**WILL.**

1. Construction of a Will ; giving to the testator's daughter, by the description of heir under his Will, the legacy of a legatee, who died during the testator's life, by way of special substitution ; not merely by lapse to her, as the residuary legatee. *Rose v. Rose.* 347

2. Legacy to a subscribing witness to a Will, though of personal property only, void under the Stat. 25 Geo. II. c. 6, extending to all Wills and Codicils. *Lees v. Summersgill.* 508

See Bastard, 1. Cross Remainders. Legacy. Mistake, 3. Perpetuity. Possibility.

**WORDS.**—See Statute.

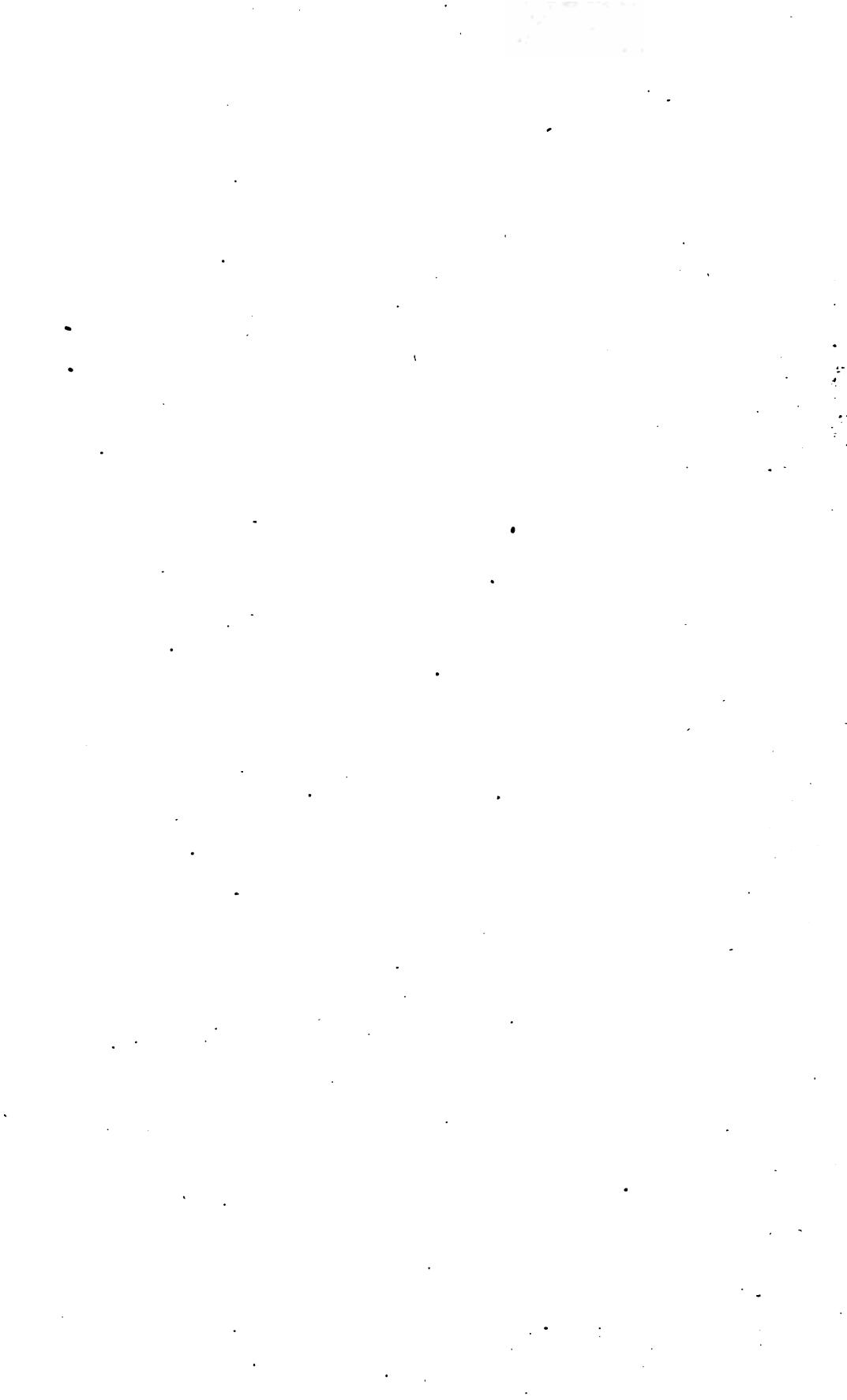
**WRIT or RIGHT.**

See Infant, 1.

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